No. 93-392

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TROOPER THOMAS GARDNER,

Petitioner,

v.

RICHARD REED, individually, as administrator of the decedent's estate of Pamela Jo Reed and as guardian of the estates of Angela Reed and Marilyn Reed; CHIEF HERMAN A. DAVIDSON; CITY OF MARTINSVILLE; DEPUTY SHERIFF JAMES F. BENDER; CLARK COUNTY, ILLINOIS; DEPUTY SHERIFF JACK RAGSDALE; and JASPER COUNTY, ILLINOIS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a police officer violate the due process rights of victims of private car accidents because he arrests an allegedly sober driver and abandons the car to a drunk passenger who then drives the car and eventually causes the accident?

LIST OF PARTIES

In the Seventh Circuit, the appellants were: Richard Reed, individually, as administrator of the decedents' estates of Pamela Jo Reed and Jason Wesley Reed and as guardian of the estates of Angela Reed and Marilyn Reed; Marilyn Kuykendall and Roy Kuykendall. Richard Reed, in his capacity as administrator of the decedent's estate of Jason Wesley Reed, and the Kuykendalls are not respondents in this Court because their claims are immaterial to this petition for certiorari. *See infra* p. 8 n.3. The appellees in the Seventh Circuit were: Illinois State Trooper Thomas Gardner; Chief Herman A. Davidson of the Martinsville, Illinois, Police Department; the City of Martinsville; Deputy Sheriff James F. Bender of Clark County, Illinois; Clark County, Illinois; Deputy Sheriff Jack Ragsdale of Jasper County, Illinois; and Jasper County, Illinois. (App. 19-20).

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Illinois State Trooper Thomas Gardner, respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on February 23, 1993.

OPINIONS BELOW

The United States District Court for the Southern District of Illinois entered an unpublished memorandum and order on July 10, 1991. (App. 21). The United States Court

of Appeals for the Seventh Circuit entered its opinion and judgment on February 23, 1993. The appellate court's opinion is published at 986 F.2d 1122. (App. 1). The appellate court denied Gardner's petition for rehearing with a suggestion for rehearing en banc in an unpublished order on June 8, 1993. (App. 17).

JURISDICTION

The United States Court of Appeals entered its judgment on February 23, 1993. (App. 15-16). On March 10, 1993, the appellate court granted Gardner's motion for an extension of time to file a petition for rehearing to and including March 30, 1993. Gardner filed a timely petition for rehearing with a suggestion for rehearing en banc, and the appellate court denied this petition on June 8, 1993. (App. 17-18). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

STATEMENT OF THE CASE

I. The Events Leading to Rice's Car Crash With the Reeds

Larry Rice had been drinking at the Orchard Inn, Inc., on the morning of September 11, 1988. (App. 48). After leaving the Orchard Inn, he was a passenger in Cathy Irby's car in Clark County, Illinois, when State Trooper Thomas Gardner, Chief Herman A. Davidson of the Martinsville Police Department and Deputy Sheriff James F. Bender of Clark County arrested Irby. (App. 51). The officers left Rice in the car with Irby's keys. (App. 51).

Two hours passed. (App. 51). Rice, while drunk, was driving Irby's car south on Route 130 in Jasper County, Illinois. (App. 40). Deputy Sheriff Jack Ragsdale of Jasper County was pursuing Rice at over ninety miles per hour in his unmarked car without sounding a siren, operating adequate flasher lights or otherwise giving adequate warning to oncoming traffic. (App. 59). Plaintiff Richard Reed, his wife, Pamela Jo Reed, and their two daughters, Marilyn and Angela Reed, were riding north in their car on Route 130 at the same time. (App. 40, 50). Pamela Jo Reed was pregnant. (App. 41). Marilyn and Roy Kuykendall were riding in the Reeds' car as well. (App. 45-46). Rice crossed the center line and crashed into the Reeds' car. (App. 50). The Reeds and the Kuykendalls all suffered injuries or died from the accident. (App. 51-52).

II. The Lawsuit

Richard Reed (appearing individually, as guardian of the estates of Angela Reed and Marilyn Reed and as administrator of the decedents' estates of Pamela Jo Reed and the fetus she was carrying, Jason Wesley Reed) and the Kuykendalls sued Larry Rice, Cathy Irby, Orchard Inn,

Inc., all four police officers and the governmental entities employing the officers in a thirteen-count amended complaint.[1]

Eleven of the thirteen counts assert claims under state law for either negligence or willful and wanton conduct. Count 10, however, claims that Officers Gardner, Davidson and Bender, all of whom allegedly arrested Irby and left the car keys with Rice, violated the plaintiffs' civil rights under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 by "entrusting the car to Rice, when they knew or should have known that Rice was intoxicated, that Rice would drive the car, and that when Rice drove the car, injury was likely to result." (App. 51). Count 8 asserts precisely the same claim against Irby, although under the state law of negligent entrustment:

> Approximately two hours before the crash, defendant Cathy Irby, along with defendants Gardner, Davidson and Bender, as alleged in Counts X and XI, negligently entrusted her car to defendant Larry Rice when she knew or should have known that Rice was intoxicated, that he would drive the car, and that when he drove the car, injury was likely to result.

(App. 46).

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[1] The amended complaint does not state whether the plaintiffs sued Gardner in his official or individual capacity. (App. 38). The Seventh Circuit evidently construed the amended complaint to be against Gardner in his personal capacity, so the Eleventh Amendment presented no bar to federal jurisdiction. *Hafer v. Melo*, 112 S. Ct. 358, 365 (1991) (Eleventh Amendment does not bar suits for damages against state officials sued in their individual capacities). The district court had original jurisdiction over the civil rights claims against Gardner, which are the only claims at issue in this petition for certiorari, under 28 U.S.C. §§ 1331 and 1343(a)(3) (1988) because the plaintiffs sued under 42 U.S.C. § 1983 (1988) and the Due Process Clause of the Fourteenth Amendment.

Gardner moved to dismiss the counts against him. With regard to the section 1983 claim, Gardner argued that this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), precluded his liability because, under *DeShaney*, state actors have no obligation to protect individuals against private violence. (App. 28-29). Gardner argued that Rice injured the Reeds and the Kuykendalls by crashing into their car and that Gardner had no constitutional obligation to protect them from such private violence.

The plaintiffs attempted to distinguish *DeShaney* by arguing that Gardner affirmatively created the danger to the plaintiffs by entrusting the car to Rice. (App. 29). The district court rejected this characterization of the allegations in the amended complaint. The court noted that "[t]he allegations are stated in positive terms—'They left defendant Larry Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice'—but the thrust of this allegation is that the defendants failed to prevent Rice from taking control over the vehicle." (App. 29).

The district court nonetheless appeared to accept the plaintiffs' description of *DeShaney*'s holding. The court suggested that if the plaintiffs had alleged that the arresting officers had taken "a safe situation and turned it into a dangerous situation by arresting Irby," then they would have stated a claim despite *DeShaney*. (App. 30). The court explained that the amended complaint failed under this rule because Irby herself was drunk. Thus, "[a]t best, the amended complaint alleges that the officers, after removing one intoxicated driver from the road, failed to take steps to prevent a second intoxicated person from taking the wheel." (App. 30). For this reason, the court held that the plaintiffs failed to state a claim. (App. 30-31). The court also dismissed the civil rights claims on the

fetus' behalf because fetuses have no rights under the Due Process Clause. (App. 32).

III. The Plaintiffs' Appeal to the Seventh Circuit

The Seventh Circuit affirmed in part and reversed in part in a split decision. The majority reversed the district court's analysis of *DeShaney* and held that the amended complaint stated a claim under section 1983. The majority began by holding that the district court had gone outside the pleadings by declaring that Irby herself was drunk. (App. 3). The court stated that it could only reasonably read the amended complaint to allege that Irby was sober.[2] (App. 3-4). Given this reading of the amended complaint, the majority considered the issue on appeal to be "whether injured parties can state a claim under section 1983 when police officers arrest a sober driver and leave behind an obviously drunk passenger who takes the wheel." (App. 4). The majority considered this to be "an indisputably close question." (App. 9).

The majority noted that "*DeShaney*'s emphasis on the state's obligation under the Due Process Clause to those in its custody seems at first to prevent plaintiffs from proceeding under section 1983." (App. 4). The majority conceded that Gardner never took the Reeds or even Rice

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[2] The court of appeals knew that this reading of the amended complaint was false as a factual matter. As the court explained, at least one defendant brought Irby's intoxication to the district court's attention and the appellants admitted in their appellate brief that Irby was arrested for drunken driving. (App. 3). Indeed, the court remanded the case only for a perfunctory summary judgment proceeding: "Our holding makes it clear that the Reeds face an insurmountable hurdle on summary judgment. . . . [T]he evidence of Irby's intoxication supports a finding of summary judgment on the claim for civil rights violations." (App. 6).

into custody and that the Reeds had never even encountered Gardner or the other arresting officers. (App. 4-5). Nonetheless, the majority (like the district court), citing two sentences from *DeShaney*, stated that *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." (App. 5). Thus, despite *DeShaney*'s holding that the Due Process Clause imposes no obligation on state officials to protect the general public, the majority held that police officers "may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger." (App. 9).

In reaching this conclusion, the majority readily acknowledged that the arresting officers did not promote or encourage Rice's conduct. It expressly rejected any inference that "the police handed the keys to Rice, left the car running, or encouraged Rice to drive himself home." (App. 5 n.1). Similarly, the majority recognized that the police did not buy Rice drinks or provide him with a car. (App. 9). Rather, the officers' section 1983 liability rested solely on "the police action in removing Irby, combined with their knowledge of Rice's intoxication . . . ." (App. 6). According to the majority, "[p]olice officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger or at least render others on the road more vulnerable." (App. 5).

Further, the majority concluded that the complete lack of direct contact between the arresting officers and the plaintiffs and the two-hour time lapse between Irby's arrest and the accident did not preclude liability. In its view, "[t]he dangers presented by drunk drivers are familiar and specific; in addition, the immediate threat of harm

has a limited duration." (App. 8-9). Since the police created a "specific danger," the majority reasoned that they "need not know who in particular will be hurt" for section 1983 liability to attach. (App. 9). Rather, they "can be held accountable by any injured party." (App. 9). Likewise, the majority found that the two-hour time lapse and the distance between the arrest and the accident were "not sufficiently attenuated to relieve the defendants of section 1983 liability." (App. 9). Accordingly, the majority reversed the district court's dismissal with respect to the claim against defendant Gardner.

Judge Richard A. Posner dissented in part[3] and refused to join the majority's holding on the due process issue. (App. 12). He stated that "an affirmance could be defended," but he refused to address the merits of this "difficult constitutional question" because he felt that the Reeds' concessions on appeal regarding Irby's intoxication made resolution of the question unnecessary. (App. 12-14). Therefore, he would have remanded the case with directions to conduct a summary judgment proceeding. (App. 14).

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[3] Judge Posner concurred with the majority's holdings that the fetus had no cause of action under the Fourteenth Amendment and that the court lacked appellate jurisdiction over the Kuykendalls' claims under Federal Rule of Appellate Procedure 4(a)(5). (App. 10-12). Because the court affirmed the district court's judgment with respect to the fetus' claims and because the Kuykendalls never properly appealed from the district court, the claims of the fetus and the Kuykendalls are immaterial to this petition for certiorari, and these parties are not respondents in this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* AND, DESPITE THIS COURT'S REPEATED ADMONITIONS, INVITES FURTHER EXPANSION OF POLICE OFFICERS' LIABILITY UNDER THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE.

As the Seventh Circuit fully recognized, Gardner never specifically intended to harm the Reeds in any way; indeed, he never even met them. In fact, the amended complaint does not even permit an inference that Gardner intended to harm *anyone* in particular. Yet, the court of appeals held that Gardner violated the Reeds' substantive due process rights when they sustained injuries at the hands of a private actor.

This ruling subverts the holding of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). By recognizing a duty under the Due Process Clause where no direct contact exists between the police officer and the section 1983 plaintiff, the court of appeals transgressed *DeShaney*'s core principle. The court imposed a constitutional duty upon police officers to protect the public from private acts of violence without *any* tangible link between section 1983 plaintiffs and the officer allegedly responsible for the deprivation of liberty.

This Court has repeatedly admonished that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Court has "previously rejected claims that the Due Process Clause should be interpreted to impose

federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992). "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Creating liability under the Due Process Clause in this context, where the Reeds' claim against Gardner amounted to nothing more than a run-of-the-mill negligence claim, is directly contrary to these fundamental constitutional limits.

The decision is all the more erroneous in this respect. Many state courts would *dismiss* negligent entrustment claims against police officers like this one for failure to state a claim under the common law "public duty" doctrine. *See, e.g., Jackson v. City of Wentzville*, 844 S.W.2d 585, 587-89 (Mo. Ct. App. 1993) (plaintiff had no negligent entrustment claim against police officers for a drunk driving accident because "any duty held by a police officer to prevent an intoxicated person from driving while intoxicated is a duty owed to the general public"). *See generally* James L. Isham, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 § 2[a], at 325 (1986) (clear majority of courts refuse to impose liability on police officers for failing to restrain drunk drivers because any duty was owed only to the general public). The Seventh Circuit thus found a cause of action under the substantive component of the Due Process Clause for allegations that would not even support a negligence suit under most state common law.

Furthermore, the decision adds to the difficulty of making myriad judgment calls routinely required of police of-

ficers. Had Trooper Gardner restrained Rice's movement in this case by removing him from the scene or by leaving him in the car without keys, the trooper likely would have been forced to defend against other section 1983 actions. *See, e.g., Fields v. City of South Houston*, 922 F.2d 1183 (5th Cir. 1991) (false arrest); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir.), *cert. denied*, 112 S. Ct. 656 (1991) (passenger injured by third party after police arrested driver, impounded car because passenger was too drunk to drive and left passenger in high crime area); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (passenger injured by third party after police arrested driver and left passenger in car in high crime area); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (children injured by police action of abandoning them on highway after uncle was arrested). This result offers police officers the Hobson's choice that this Court foresaw in *DeShaney*: state officials will face liability for whatever course they follow. 489 U.S. at 203. This Court should grant the writ of certiorari to curtail the Seventh Circuit's erroneous expansion of due process principles.

II.

THE SEVENTH CIRCUIT'S DECISION, VIEWED WITH OTHER STATE AND FEDERAL COURTS' VARIED APPLICATIONS OF SUBSTANTIVE DUE PROCESS PRINCIPLES, GRAPHICALLY DEMONSTRATES THE NEED FOR THIS COURT'S FURTHER GUIDANCE.

Almost ten years ago, Justice White argued that the Court should grant certiorari in a case because of "the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort." *Jackson v. City of Joliet*, 465 U.S. 1049, 1051

(1984) (White, J., joined by Rehnquist, J., dissenting from the denial of certiorari). Although the Court has, since then, attempted to address Justice White's concerns, the majority opinion below violates the principles of each of those later cases. The Seventh Circuit's decision thus illustrates well that, despite this Court's efforts to clarify the law, the scope of a "constitutional tort" under the substantive component of the Due Process Clause remains just as " 'perplexing' " for the lower courts today as it was ten years ago. *Id.*

Since *Jackson*, this Court has limited liability in this context in two ways. First, applying the tort-law concept of duty, the Court held in *DeShaney* that state actors have no due process obligation to protect members of the general public from private violence. 489 U.S. at 195-203. The Court strongly reaffirmed *DeShaney* in *Collins*, holding that even the government's deliberate indifference to its own employees' safety did not violate due process. 112 S. Ct. at 1070. Furthermore, the Court has imposed a state-of-mind requirement for due process claims, holding that merely negligent conduct does not violate due process. *Daniels*, 474 U.S. at 330-33; *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986).

The Seventh Circuit's judgment below is inconsistent with each of these cases and reflects only one of many approaches by the lower courts in grappling with this exceedingly difficult constitutional issue. According to the majority below, due process violations turn on who creates the danger to the public. When the police, by some "affirmative act," make any member of the general public more vulnerable to a foreseeable danger and someone among the public is then injured by that danger, the police have violated that person's due process rights. On the other hand, if the affirmative acts of the police did not

create the danger in the first place, then the police action of failing to prevent the injury cannot trigger due process liability. (App. 5-10).

The confusion over "affirmative act" liability comes from the lower courts' attempts to apply this Court's opinion in *DeShaney*. Two passages from *DeShaney* have caused serious confusion in the lower courts. The Court first stated:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200 (footnote omitted). The "harms Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." *Id.* at 201 (footnote omitted). For this reason, Joshua failed to state a substantive due process claim.

The Court then appeared to qualify this language by suggesting that the state actor's creation of a danger for the plaintiff might constitute a restraint of "liberty" under the Due Process Clause even if the state had *never* incarcerated the plaintiff:

> While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him more vulnerable to them.* That the State once took custody of Joshua does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

489 U.S. at 201 (emphasis added). Courts have issued markedly inconsistent opinions in applying these two passages, holding either that (1) some sort of physical restraint must precede the state actor's wrongful conduct or (2) any state action that makes the public more vulnerable to danger violates due process regardless of any earlier physical restraint.

Many courts, unlike the Seventh Circuit below, have held or strongly suggested that the State must first physically incarcerate or restrain the plaintiff to oblige the State to protect him against violence committed by third parties. As the Supreme Judicial Court of Massachusetts held, "Under the United States Constitution, the State has no affirmative duty to provide services absent custody." *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447, 457 (Mass. 1993).[4] Jus-

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[4] *Accord Doyle v. Oklahoma Bar Ass'n*, 1993 U.S. App. LEXIS 18064, at *23-24 (10th Cir. July 19, 1993) ("Substantive due process does not encompass a right to compel a state to do something for someone not under some form of custody or restraint . . . ."); *Harris v. District of Columbia*, 932 F.2d 10, 14-15 (D.C. Cir. 1991) (plaintiff had no cause of action against police who responded to plaintiff's emergency medical call because plaintiff had voluntarily called the ambulance); *Wright v. Bailey*, 611 So. 2d 300, 303-306 (Ala. 1992) (failure to arrest drunk driver creates no liability because no custodial relationship exists between officer and victim); *W.L.O. v. Smith*, 585 So. 2d 22, 25 (Ala. 1991) (custodial relationship needed); *Moore v. City of Lewiston*, 596 A.2d 612, 616-17 (Me. 1991) (police not liable to passenger who was victim of crime after police arrested drunk driver because passenger was never in custody); *Ashby v. City of Louisville*, 841 S.W.2d 184, 190 (Ky. Ct. App. 1992) (no due process violation "unless it is shown, in a given situation, that the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor"); *Cleveland v. Fulton County*, 396 S.E.2d 2, 3 (Ga. App. Ct. 1990) (requiring custody or control of the State to impose liability), *cert. denied*, 1990 Ga. LEXIS 640 (Ga. Sept. 4, 1990); *Henke v. Superior Court of Arizona*, 775 P.2d 1160, 1165 (Ariz. Ct. App. 1989) (requiring custody).

tice Brennan's dissent in *DeShaney* itself supports this description of *DeShaney*'s holding. 489 U.S. at 206 (Brennan, J., dissenting) ("to the Court, the only fact that seems to count as an 'affirmative act of restraining the individual's freedom to act on his own behalf' is direct physical control").

Collins v. City of Harker Heights also supports this reading of *DeShaney*. In that case, a city sewer worker sued his employer, alleging that the city was deliberately indifferent to his safety by failing to warn him about dangers in the work place. 112 S. Ct. at 1064-65. This Court held that the plaintiff failed to state a claim, in part, because the city had not incarcerated the plaintiff. *Id.* at 1069 (plaintiff's claim "is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty"). Because the city had not physically restrained the plaintiff, the Court considered the plaintiff's claim to be "analogous to a fairly typical state law tort claim" and held that, as such, it did not implicate the Due Process Clause. *Id.* at 1070. If the government's deliberate indifference to the safety of a nonincarcerated person did not violate due process in *Collins*, it should not violate due process in this case either. *See Fagan v. City of Vineland*, 1993 U.S. App. LEXIS 20327, at *78-79 (3d Cir. Aug. 5, 1993) (Sloviter, J., dissenting) (after *Collins*, "the reckless indifference of government employees is an insufficient basis upon which to ground their liability for [wrongful police action] under the Due Process Clause. Such an inquiry is grounded in tort law, not in constitutional principles") (footnotes omitted).

Many other courts have held that, while actual incarceration is not necessary, *DeShaney* still requires at least

a preexisting relationship between the plaintiff and defendant that is sufficiently analogous to physical custody to distinguish the plaintiff from members of the general public.[5] Most significantly, these courts explicitly considered and rejected the creation-of-a-danger analysis that the Seventh Circuit applied below in its attempt to distinguish *DeShaney*.

In *Nobles v. Brown*, for example, the Sixth Circuit found no due process violation when a prison guard sued prison officials under section 1983 after she was taken hostage and raped by prisoners. 985 F.2d at 235-36. The Sixth Circuit conceded that *DeShaney* was factually distinguishable because in *Nobles*, unlike *DeShaney*, the defendants allegedly made the plaintiff more vulnerable to danger:

> Although the logic of *DeShaney* clearly governs the instant case, in our view, there are some obvious factual distinctions between that case and this one. While the State of Wisconsin was aware of the dangers faced by the child in *DeShaney*, for example, "it played no part in their creation. . . ." In the case at bar, by contrast, the defendant officials are charged with having played a part in creating the dangers faced by the plaintiff.

985 F.2d at 237 (citation to *DeShaney* omitted). Thus, even though prison guards "played a part in creating the danger," *id.*, the Sixth Circuit held that *DeShaney* precluded liability.

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[5] *Monahan v. Dorchester County Counseling Center, Inc.*, 961 F.2d 987, 990-94 (1st Cir. 1992); *Weller v. Department of Social Services for the City of Baltimore*, 901 F.2d 387, 392 (4th Cir. 1990); *de Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989); *Nobles v. Brown*, 985 F.2d 235, 237-38 (6th Cir. 1992); *Garcia v. Superior Ct. of Santa Clara County*, 789 P.2d 960, 967 (Cal. 1990); *Allen v. Anderson*, 490 N.W.2d 848, 852-54 (Iowa Ct. App. 1992).

Nobles directly conflicts with the Seventh Circuit's decision below. According to the Seventh Circuit's reasoning, a state actor owes a duty when he adds to a danger, including a danger not directed at any particular person and including a danger not directed at a person with a preexisting relationship with the state actor. The Sixth Circuit, in contrast, narrowly limits substantive due process claims. As that court most recently explained: " 'The proper analysis is whether *a special relationship exists* . . . between the victim and the state or whether there is some showing that the victim, *as distinguished from the public at large*, faces a danger [from the private actor].' " *Jones v. City of Carlisle*, 1993 U.S. App. LEXIS 21666, at *8-9 (6th Cir. Aug. 27, 1993) (emphasis added) (quoting *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986)). Indeed, in *Nobles*, the court suggested that "clothing [a private actor] with the authority of the state" may be a predicate to such section 1983 claims. 985 F.2d at 238 n.1.[6]

The First Circuit also rejected the Seventh Circuit's approach to substantive due process in *Monahan*. In that case, even though the defendant's act "could plausibly be said to have rendered [the plaintiff] more vulnerable to danger," such an act is "not the kind of 'affirmative act' on the part of the state which would give rise to a *constitutional* rather than a tort duty to protect." 961 F.2d

[6] *Nobles v. Brown* is also noteworthy in that it questions whether *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc), a leading pre-*DeShaney* decision upon which the majority relied below (App. 8), remains good law after *DeShaney*. *Nobles*, 985 F.2d at 238 n.1. Significantly, Sixth Circuit Judges David A. Nelson and Danny J. Boggs, who both joined the en banc majority in *Nishiyama*, were on the *Nobles* Sixth Circuit panel that expressed these reservations about *Nishiyama*. The Seventh Circuit thus relied on a case that may no longer be good law in the circuit that decided it.

at 993. Even if the state "played some causal role in the harm, it did so only because Monahan voluntarily availed himself of a [State] service." *Id.* Applying this same reasoning, many courts have rejected substantive due process claims against police officers for failing to restrain drunk drivers.[7] Similarly, courts have also found no cause of action when the plaintiff is only a member of the general public who had no preexisting relationship with the state defendant.[8]

Some courts, however, like the Seventh Circuit below, have held that any creation of a danger by a state actor creates a due process duty even if the state had not restrained the plaintiff in any way. For example, the Ninth Circuit reached the opposite result of both the Fifth Circuit in *de Jesus Benavides* and the Sixth Circuit in *Nobles* in holding that a prison nurse who was raped by prisoners could sue prison officials. *L.W. v. Grubbs*, 974 F.2d 119, 121-23 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993). The *L.W.* court, like the Seventh Circuit below, reasoned that "*DeShaney* did not rule that custody was required where the state affirmatively causes the harm." 974 F.2d at 121. The Tenth Circuit applied similar reasoning in a police chase case. In *Medina v. City and County of Den-*

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[7] *California First Bank v. New Mexico*, 801 P.2d 646, 657 (N.M. 1990); *Wright v. Bailey*, 611 So. 2d at 303-306; *Moore v. City of Lewiston*, 596 A.2d at 616-17; *Estate of Kelly v. City of Grosse Pointe Park*, 448 N.W.2d 352, 357 (Mich. App. Ct. 1989), *application denied*, 463 N.W.2d 708 (Mich. 1990).

[8] *Marshall v. Winston*, 389 S.E.2d 902, 905 (Va. 1990); *Engstrom v. Iowa*, 461 N.W.2d 309, 319 (Iowa 1990); *Vigil v. Martinez*, 832 P.2d 405, 406 (N.M. Ct. App. 1992); *Duong v. County of Arapahoe*, 837 P.2d 226, 229 (Colo. Ct. App.), *cert. denied*, 1992 Colo. LEXIS 983 (Colo. Oct. 13, 1992); *Hayes v. City of Chicago*, 595 N.E.2d 144, 148 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 452 (Ill. 1992).

ver, 960 F.2d 1493 (10th Cir. 1992), a bicyclist who was injured by a fleeing felon's car sued the police officers who were pursuing the felon. Even though the officers had no preexisting relationship whatsoever with the plaintiff, the court found liability. *Id.* at 1496.[9]

All these cases were decided after *DeShaney* and illustrate the difficulty that courts have had in applying the decision. This Court should grant certiorari to resolve these conflicts and clarify this important constitutional question.

CONCLUSION

The majority decision below violates this Court's reasoning in *DeShaney* by permitting members of the general

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[9] *See also Fagan v. City of Vineland*, 1993 U.S. App. LEXIS 20327, at *34-44 (police officer can be liable to innocent bystanders whose car was struck by car attempting to evade police officer because police acted recklessly); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (protester could sue police after being beaten by skinheads because police allegedly "assisted in creating or increasing the danger to the victim"); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1370, 1373-76 (3d Cir. 1992) (en banc) (acknowledging that *DeShaney* primarily requires "physical custody," but still analyzing whether the defendants made the plaintiffs more vulnerable to harm), *cert. denied*, 113 S. Ct. 1045 (1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) (analyzing whether police created danger that passengers in car would drive away and get in accident when police arrested driver), *cert. denied*, 113 S. Ct. 1265 (1993); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992) (analyzing whether a sheriff created the danger that a hostage would be killed by her captor); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 355-59 (11th Cir. 1989) (town clerk could sue town for permitting prisoners to do community work near her office and failing to prevent two prisoners from abducting her), *cert. denied*, 494 U.S. 1066 (1990); *Culver-Union Township Ambulance Serv. v. Steindler*, 611 N.E.2d 698, 703 (Ind. Ct. App. 1993) (plaintiff could sue township for inadequate ambulance service policy).

public to sue a police officer based solely on an allegation that he did his job poorly. Some federal circuits have applied similar analyses since *DeShaney* while some state courts and other federal circuits have not. Given the gravity of the issue presented and this large split of authority, this Court should grant certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TROOPER THOMAS GARDNER,

Petitioner,

v.

RICHARD REED, individually, as administrator of the decedent's estate of Pamela Jo Reed and as guardian of the estates of Angela Reed and Marilyn Reed; CHIEF HERMAN A. DAVIDSON; CITY OF MARTINSVILLE; DEPUTY SHERIFF JAMES F. BENDER; CLARK COUNTY, ILLINOIS; DEPUTY SHERIFF JACK RAGSDALE; and JASPER COUNTY, ILLINOIS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-3173

RICHARD REED, individually and as administrator of the decedents' estates of Pamela Jo Reed and Jason Wesley Reed, and as guardian of the estates of Angela Reed and Marilyn Reed, minors, and MARILYN KUYKENDALL and ROY KUYKENDALL,

Plaintiffs-Appellants,

v.

TROOPER GARDNER, CHIEF HERMAN A. DAVIDSON, CITY OF MARTINSVILLE, DEPUTY SHERIFF JAMES F. BENDER, CLARK COUNTY, ILLINOIS, DEPUTY SHERIFF JACK RAGSDALE and JASPER COUNTY, ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 90-4199-JLF—**James L. Foreman,** *Senior Judge.*

ARGUED SEPTEMBER 17, 1992—DECIDED FEBRUARY 23, 1993

Before POSNER and FLAUM, *Circuit Judges*, and ZAGEL, *District Judge.**

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* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

FLAUM, *Circuit Judge.* The Reed family suffered a tragic accident on September 11, 1988, when a drunk driver crossed the center line of the highway and crashed into their car. Earlier that day, defendants Gardner, Davidson, and Bender had arrested the original driver of the car, leaving a drunk passenger behind. That passenger became the drunk driver who caused the head-on collision approximately two hours later. The plaintiffs appeal from the district court's dismissal of their section 1983 claims against Gardner, Davidson, and Bender, and from the dismissal of Jason Wesley Reed's claims. We reverse in part and affirm in part.

I.

We review de novo the district court's decision on a motion to dismiss, assuming, as the district court must, the truth of all well-pleaded factual allegations and drawing all reasonable inferences in favor of the plaintiff. *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991). According to the complaint, Richard Reed was driving a Chevrolet Suburban north on Illinois Route 130 in Jasper County at midafternoon on September 11, 1988. His wife Pamela Jo Reed, who was eight months pregnant, sat next to him, and their young daughters Angela and Marilyn Reed sat in the back with Pamela's parents Roy and Marilyn Kuykendall. Larry Rice was driving south on Route 130 when he crossed the center line and collided head on with the Reed's car. He was intoxicated at the time of the crash and was being pursued at high speeds by defendant Deputy Sheriff Jack Ragsdale. Pamela Jo Reed died of her injuries, as did the fetus she carried, Jason Wesley Reed. Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and several broken bones. Richard and Angela Reed sustained minor physical injuries, and both suffer severe emotional trauma. The Kuykendalls suffered broken bones and internal injuries, in addition to emotional trauma.

Approximately two hours before the accident, defendants State Trooper Thomas Gardner, Chief Herman Davidson

of the Martinsville Police Department, and defendant Deputy Sheriff James Bender of the Clark County Sheriff's Department arrested Cathy Irby in Clark County. They left Larry Rice, who had been riding in Irby's car, inside the car with Irby's car keys, although they knew or should have known that Rice was intoxicated.

The district court dismissed Count X of the appellants' complaint, ruling that under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998 (1989) appellants could not state a claim for deprivation of constitutional rights. The Supreme Court in *DeShaney* held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1004. The district court began with the premise that "the thrust of the allegation[s] is that the defendants failed to prevent Rice from [operating] the vehicle", rejecting the plaintiffs' emphasis on the defendants' affirmative action in arresting Irby and "entrusting the car to Rice." Unfortunately, the district court then went outside the pleadings to distinguish cases finding section 1983 liability; it held that the police did not create the dangerous situation in this case because Cathy Irby herself was arrested for driving while intoxicated.

The pleadings, however, contain no allegation, nor can a reasonable inference be drawn, that Cathy Irby was intoxicated when the defendants arrested her. At least one defendant brought to the district court's attention the reason for Irby's arrest, that she was driving while intoxicated. The appellants admit in their brief that this was the reason for Irby's arrest, yet it cannot support the defendants' motions to dismiss. The district court might have converted its ruling to one of summary judgment, and noted the additional crucial fact outside the pleadings. The plaintiffs might have filed a motion for reconsideration based on the inclusion of a fact outside the pleadings. Instead, the district court dismissed the count, relying on Irby's intoxication, and the plaintiffs appealed. We cannot affirm the district court's ruling based on its reasoning.

Assuming the truth of the allegations in the pleadings and making reasonable inferences for the plaintiffs, we must decide whether injured parties can state a claim under section 1983 when police officers arrest a sober driver and leave behind an obviously drunk passenger who takes the wheel. We can affirm only if in that situation *DeShaney* forecloses an action for a civil rights violation. Because on remand the defendants undoubtedly will offer proof of the reason for Irby's arrest, however, we will also address the outcome if the plaintiffs had plead that Irby was intoxicated or if summary judgment had been granted on that basis.

II.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." According to the Supreme Court, the purpose of the Due Process Clause was "to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney* at 1003. Initially, affirmative obligations to protect certain citizens grew out of prison situations, in which the state deprived prisoners of the liberty to care for themselves, *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976), and involuntary commitment of mental patients, for the same reason, *see Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982). The guiding principle of these cases is that, when a state takes custody of a person, "the Constitution imposes upon it a corresponding duty" for his protection. *DeShaney* at 1005. Inaction by the state in the face of a known danger is not enough to trigger the obligation; according to *DeShaney*, the state must have limited in some way the liberty of a citizen to act on his own behalf.

DeShaney's emphasis on the state's obligation under the Due Process Clause to those in its custody seems at first to prevent plaintiffs from proceeding under section 1983. Not only were the Reeds never in custody, they had never

encountered the defendants. The defendants did not even take Rice into custody. *DeShaney*, however, leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger. *Id.* at 1006 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. . . . [I]t placed him in no worse position than that in which he would have been had it not acted at all. . . ."); *see also Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) ("[T]he Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.") (citations omitted). Police officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger or at least render others on the road more vulnerable. Certainly the Reeds are worse off with a drunk driver heading toward them than a sober one.

The complaint accuses defendants Gardner, Davidson, and Bender of infringing the rights of the appellants by creating a dangerous situation and failing to protect them from it.[1] This case, therefore, is distinguishable from cases

[1] The complaint alleges that the defendants "left . . . Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice . . . ." Appellants and appellees argue over whether this language asserts affirmative conduct or mere inaction. This debate should not detain us. The allegations of the complaint allow reasonable inferences that the defendants left Rice behind, knowing that he was intoxicated and that the keys were in the car. It does not permit inferences that the police handed the keys to Rice, left the car running, or encouraged Rice to drive himself home. The affirmative conduct comes from arresting and removing Irby while knowing that a drunk passenger with the keys remained in the car. That is sufficient for the Reeds, after being injured by the drunk passenger, to state a claim under section 1983.

in which state actors had no hand in creating a danger but "stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney* at 1007; *see, e.g. Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. den.* 489 U.S. 1065, 109 S.Ct. 1338 (1989) (no §1983 liability for failure to provide requested emergency services). *DeShaney* and its progeny make it clear that the police have no affirmative obligation to protect citizens from drunk drivers. Taken to an extreme, police officers could watch drunk drivers stumble to their cars and drive off, weaving across the road, without incurring section 1983 liability. Similarly, if the defendants had failed to arrest Irby, they would have had no liability if she had exchanged places with Rice and he had driven headlong into the Reed's car. It was the police action in removing Irby, combined with their knowledge of Rice's intoxication, which creates their liability for the subsequent accident.

Our holding makes it clear that the Reeds face an insurmountable hurdle on summary judgment. As the district court foreshadowed, police officers are not subject to liability under section 1983 for exchanging one drunk driver for another. The reason is simple: without state intervention, the same danger would exist. The state action did not place individuals in a position of danger that otherwise they would not have faced. The Reeds are no worse off with Irby driving while intoxicated than they are with Rice driving while intoxicated.[2] Therefore, the evidence of Irby's intoxication supports a finding of summary judgment on the claim for civil rights violations.

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[2] The appellants argue that Rice was more intoxicated and thus more dangerous. We cannot foresee imposing liability based on that type of hairsplitting. The officers' knowledge of the intoxication of those with car keys will be the standard. Otherwise, we run the risk of demanding, under the same line of reasoning, distinctions between which driver was more adept or experienced or well-rested.

Even if Irby had not been intoxicated, the defendants might have prevailed on a summary judgment motion if the plaintiffs could offer no support for the allegation that the officers "knew or should have known that Rice was intoxicated." The Eighth Circuit recently grappled with a similar case, in which the police arrested a sober "designated" driver and left intoxicated passengers in the car. *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc). After detaining the driver for running a red light, police officers discovered an outstanding arrest warrant for him. The officers allowed the driver to follow them to the police station in his car with his passengers. After the sober driver entered the station, one passenger who was intoxicated drove the car and became involved in a car accident that killed him and injured the other passenger. The Eighth Circuit majority affirmed summary judgment, holding that no reasonable factfinder could have concluded that the officers knew or should have known that the passengers were intoxicated. *Id.* at 1010-11.[3] Like the Eighth Circuit, we would require from a plaintiff sufficient evidence from which a jury could reasonably draw the inference that police officers knew or should have known that car passengers were intoxicated. *See id.* at 1011 (appellants' evidence supported "nothing more than a mere supposition—a possibility or guess . . ." that the two adult passengers were intoxicated). Because the district court dismissed the Reeds' case, we do not know what evidence would support such knowledge by the defendants.

While we have been hesitant to find section 1983 liability outside the custodial setting, *see, e.g. Losinski v. Coun-*

[3] The majority also decided that, even if the officers had known the passengers were intoxicated, they could not be found liable for leaving the passengers in the car. Because the officers left the passengers in the care of their designated driver, it was that driver's negligence in leaving them with car keys that created the danger. *Id.* at 1011-12. We have no need to decide whether a sober driver in that situation must bear full responsibility for the subsequent actions of his intoxicated passengers.

ty of Trempealeau, 946 F.2d 544 (7th Cir. 1991); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), we find that plaintiffs such as the Reeds may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that [sic] they otherwise would have been. *See Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) (plaintiff whose son drowned stated §1983 claim where arbitrary county policy prevented private assistance and failed to provide state assistance). Our recent decision in *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991) evidences a narrow but critical distinction. In *Losinski*, a sheriff's deputy accompanied a woman, at her request, to her estranged husband's trailer where she intended to retrieve some belongings. The deputy did not intervene in an ensuing dispute between Julie Losinski and her husband until the husband produced a gun and shot her. Although we found the issue to be close, we determined that the state did not create or enhance the danger Losinski faced, and therefore *DeShaney* precluded section 1983 liability. *Id.* at 550-51. Julie Losinski enlisted the state's assistance in confronting a known danger, and that assistance fell short of protecting her from harm. The officers in this case initiated the state action, by arresting Irby and removing her from the car. That state intervention created the dangerous condition, a drunk driver on the road.

The defendants' lack of direct contact with the appellants does not necessarily preclude this action against them. By removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arguably changed a safe situation into a dangerous one. The dangers presented by drunk drivers are familiar and specific; in addition, the immediate threat of harm has a limited range and duration. *See Nishiyama v. Dickson County*, 814 F.2d 277, 280 (6th Cir. 1987) (en banc) (§1983 liability found where inmate uses patrol car to detain motorist whom he then murders, "identity of potential victims [not] difficult to define"); *cf. Bowers v.*

DeVito, 686 F.2d 616 (7th Cir. 1982) (no state action link to murder based on release of mental patient one year earlier). When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party. Despite the two hour time lapse and the distance between the place of Irby's arrest and the car accident, the events are not sufficiently attenuated to relieve the defendants of section 1983 liability. *Cf. Martinez v. California*, 444 U.S. 277, 286, 100 S.Ct. 553, 559 (1980) (five months since release of parolee makes girl's murder "too remote a consequence" of state action for civil rights liability to attach).

This case presents an indisputably close question. The defendants' alleged actions do not involve the same type of shocking conduct as in *Nishiyama* where deputies gave a fully equipped, clearly marked patrol car to a felon in custody and ignored the risks to motorists even after they were told that he was stopping cars at the roadside. These defendants, however, did engage in reckless conduct similar to the officer who left a passenger alone and on foot in a high crime area (*Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 341 (1990)) or the officers who arrested a driver and left young children stranded on the highway (*White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)). While they did not create the danger by buying Rice drinks and providing him with a car, they did take action under color of state law which rendered the Reeds and the other motorists on Route 130 vulnerable to a dangerous driver.

The great difficulty in this case is in judging precisely what the defendants ought to have done that they did not do. While we do not seek to expand any existing duties for police officers, we do suggest that officers may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger. Thus, removing one drunk driver and failing to

prevent replacement by another drunk will not subject officers to section 1983 liability, any more than an initial failure to remove the first drunk driver would. Further, removing one drunk driver and leaving behind seemingly sober adult passengers could not subject them to liability. Extraordinary measures are not required; the yardstick will be reasonable action based on the specific circumstances confronting the officers on the scene, subject to their immediate capabilities and the possible limitations inherent to a highway or street patrol response. For example, police officers do not have to search for an extra set of keys or other means of starting the car, nor do they have to make sure a passenger is carrying a valid driver's license. They need not ferry stranded passengers who would otherwise be inconvenienced, absent a rare combination of factors that turns the inconvenience into a real and obvious danger. It is the special circumstance plead in this case, that the defendants removed a driver, who it must be inferred was sober, and left behind a passenger, whom they knew to be drunk, with the car keys, that states a claim for deprivation of constitutional rights under 42 U.S.C. §1983.

III.

Two additional issues remain. The appellants contest the district court's dismissal of Jason Wesley Reed's claims on the basis that a fetus cannot state a claim under section 1983. We agree with the district court. Claims may be brought under 42 U.S.C. §1983 for violations of the Fourteenth Amendment. This circuit has already concluded that fetuses are not persons within the scope of the fourteenth amendment. *Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 383 (1985), *citing Roe v. Wade*, 410 U.S. 113, 158, 93 S.Ct. 705, 729 (1973). A state's protection of fetuses from criminal conduct cannot create new rights under, nor expand the scope of, the Fourteenth Amendment. Illinois' recognition of fetal life in several of its criminal statutes does not affect the

appellant's claims under section 1983. Every state right does not have a corresponding federal constitutional protection. The district court correctly dismissed the claims of the fetus.

The appellees claim that the district court abused its discretion in granting an extension for a timely appeal. The plaintiffs initially filed an appeal under the name "Richard Reed, etc., et al."; this heading does not suffice. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318, 108 S.Ct. 2405, 2409 (1988) (final judgment affirmed as to intended appellant whose name was omitted by clerical error). Rule 3(c) requires that a notice of appeal "shall specify the party or parties taking the appeal . . . ." Fed. R. App. P. 3(c).[4] When an order of this court informed them of the deficiency, the appellants went back to the district court which granted the extension.

According to the Supreme Court, Rule 3(c) presents an inflexible jurisdictional requirement for proper notice of appeal. In *Torres*, the Court specifically considered and rejected the possibility that "et al." could preserve an appeal for an unnamed party. *Torres*, at 318, 108 S.Ct. at 2409. Previously we have permitted an extension for excusable neglect, at the discretion of the district court, where the named and unnamed parties had "identical interests," so that the notice of appeal left "no room for doubt as to who is taking the appeal." *Albedyll v. Wisconsin Porcelain Co. Rev. Ret. Plan*, 947 F.2d 246, 253 (7th Cir. 1991). In this case, however, the appellants each pursue separate claims for their injuries, none dependent on another in order to appeal. An appellant's misunderstanding of Rule 3(c) and ignorance of *Torres* and recent caselaw in this circuit cannot constitute excusable neglect. The appellees had notice within thirty days that Richard Reed would appeal. It is on his appeal, individually and in his other capacities, that we rule today. We find, however,

[4] The text of Rule 3(c) does not contain a citation to *Torres* nor a specific reference to the inadequacy of the use of "et al."

that the district court's extension of time for excusable neglect cannot preserve our jurisdiction over the Kuykendalls' appeal.

The judgment of the district court is

AFFIRMED IN PART,
REVERSED IN PART.

POSNER, *Circuit Judge*, dissenting in part. I join Part III of the court's opinion, but would avoid reaching the difficult constitutional question whether, if Irby (the driver whom the police arrested) had been sober, the complaint might have stated a claim for relief under the due process clause of the Fourteenth Amendment.

The defendants' briefs state that Irby was arrested for driving while intoxicated and was in fact intoxicated. The plaintiffs filed a reply brief but did not allude to the statement, so at argument we pressed their counsel on the question. She did not admit that Irby had been arrested for drunk driving or had been drunk, but neither did she deny it—she said it was not in the record. The court interprets this response as an admission and goes on to say that, because of the admission, "the Reeds face an insurmountable hurdle on summary judgment." The problem is that the district judge did not grant summary judgment; he dismissed the case on the pleadings.

It is not obvious what difference that should make. This court has said, in effect, that the case is moot, because the only theory on which the law entitles the plaintiffs to recover requires that Irby have been sober when she was arrested. If she was drunk, then by arresting her the police did not create a danger to the Reeds or anyone else, for if they hadn't arrested her the car would still have been driven by a drunk driver, one as likely to cause an accident as the drunk who replaced Irby when she was arrested. If she was drunk, then when the defendants move for summary judgment on remand it will be granted and

we will affirm, should the plaintiffs be foolish enough to appeal. We should not pronounce on legal questions, let alone constitutional questions, let alone difficult constitutional questions, in a case in which our answers cannot alter the outcome.

It is true that when a case is dismissed on the ground that the complaint fails to state a claim, and the dismissal is appealed, the appellate court will often find itself deciding legal issues, including difficult constitutional issues, on the basis of "facts" that, being merely the facts alleged by the plaintiff in the complaint, may well be false, and the true facts may raise no legal issues at all. But it is one thing to decide a case on facts that may be false, and another to decide it on facts known to be false.

There is no insurmountable procedural obstacle to our disposing of this case without reaching the constitutional issues. A district judge can, of course, grant summary judgment on his own initiative, provided the substantive standard (no genuine issue of material fact) of Rule 56 is met and the nonmovant had adequate notice. *Russell v. PPG Industries, Inc.*, 953 F.2d 326, 332 n. 4 (7th Cir. 1992); *Macon v. Youngstown Sheet & Tube Co.*, 698 F.2d 858, 861 (7th Cir. 1983). That is proposition number one. And when a judge resolves a case on summary judgment, our review is plenary, *Tobey v. Extel/JWP, Inc.*, No. 92-1754, slip op. at 3 (7th Cir. Feb. 3, 1993); so it is as if *we* were granting summary judgment. Which is proposition number two. It follows from these two propositions that we can grant summary judgment ourselves, and on our own initiative, in an appropriate case. I can find no case in which this was done, but *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1247 (9th Cir. 1980), suggests that it is a proper procedure in an appropriate case. Cf. *American Nurses' Association v. Illinois*, 783 F.2d 716, 729 (7th Cir. 1986).

Is this an appropriate case? Admissions are trumps for purposes of Rule 56. *Tobey v. Extel/JWP, Inc.*, No. 92-1754, slip op. at 6 (7th Cir. Feb. 3, 1993); *Maksym v. Loesch*,

937 F.2d 1237, 1241 (7th Cir. 1991). But we have an inferred rather than an explicit admission, and we have not given notice to the plaintiffs of any intention to grant summary judgment. While I think an affirmance could be defended, I would be more comfortable with a remand for the limited purpose of allowing the district judge to conduct a summary-judgment proceeding that would in all likelihood enable this case to be resolved without our having to decide any constitutional questions.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: February 23, 1993

BEFORE: Honorable Richard A. Posner, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable James B. Zagel, District Judge*

No. 91-3173

RICHARD A. REED, Individually and as Administrator of the Estates of PAMELA J. REED and JASON W. REED, deceased, and as Guardian of the Estates of ANGELA REED and MARILYN REED, minors, MARILYN KUYKENDALL and ROY KUYKENDALL,

Plaintiffs-Appellants

v.

TROOPER GARDNER, CHIEF HERMAN A. DAVIDSON, CITY OF MARTINSVILLE, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. 90 C 4199, James L. Foreman, Senior Judge

* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED in part and REVERSED in part, in accordance with the decision of this court entered this date. Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1993

HON. RICHARD A. POSNER, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. JAMES B. ZAGEL, District Judge*

RICHARD A. REED, Individually and as Administrator of the Estates of PAMELA J. REED and JASON W. REED, deceased, and as Guardian of the Estates of ANGELA REED and MARILYN REED, minors, MARILYN KUYKENDALL and ROY KUYKENDALL,

Plaintiffs-Appellants,

No. 91-3173 v.

TROOPER GARDNER, CHIEF HERMAN A. DAVIDSON, CITY OF MARTINSVILLE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 90 C 4199—James L. Foreman, Senior Judge.

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* The Honorable James B. Zagel of the Northern District of Illinois, sitting by designation.

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause on March 30, 1993, by defendant-appellee, Trooper Thomas Gardner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 12, 1992

By the Court:

RICHARD A. REED, Individually and as Administrator of the Estates of PAMELA J. REED and JASON W. REED, deceased, and as Guardian of the Estates of ANGELA REED and MARILYN REED, minors, MARILYN KUYKENDALL and ROY KUYKENDALL,

Plaintiffs-Appellants,

No. 91-3173 v.

TROOPER GARDNER, CHIEF HERMAN A. DAVIDSON, CITY OF MARTINSVILLE, DEPUTY SHERIFF JAMES E. BENDER, CLARK COUNTY, ILLINOIS, DEPUTY DEPUTY [sic] SHERIFF JACK RAGSDALE, JASPER COUNTY, ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 90 C 4199—James L. Foreman, Chief Judge.

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR CORRECTION OF THE CAPTION ON APPEAL" filed herein on January 22, 1992, by counsel for appellee Thomas Gardner.

2. "PLAINTIFFS-APPELLANTS' RESPONSE TO THE MOTION OF THOMAS GARDNER TO CORRECT THE CAPTION ON APPEAL" filed herein on March 4, 1992, by counsel for the appellants.

On consideration thereof,

IT IS ORDERED that the MOTION FOR CORRECTION OF THE CAPTION ON APPEAL is GRANTED. The appellees in this case are as follows:

TROOPER GARDNER, CHIEF HERMAN A. DAVIDSON, CITY OF MARTINSVILLE, DEPUTY SHERIFF JAMES E. BENDER, CLARK COUNTY, ILLINOIS, DEPUTY SHERIFF JACK RAGSDALE, JASPER COUNTY, ILLINOIS.

App. 21

[FILED JULY 10, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 90-4199

RICHARD REED, et al.,

Plaintiffs,

vs.

LARRY RICE, et al.,

Defendants.

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court are several motions to dismiss filed by defendants Ragsdale and Jasper County (Document No. 8), Gardner and the Illinois State Police (Document No. 11), Davidson and the City of Martinsville (*See* Document No. 15), and Bender and Clark County (Document No. 23).

As a preliminary matter, the Court **GRANTS** defendants Davidson and the City of Martinsville's motion for leave to file their appearance, jury demand and motion to dismiss (Document No. 15), their Motion to Correct Defendants' Motion to Dismiss (Document No. 30), and their motions for leave to file additional appearances (Document Nos. 18 and 36). The defendants' third motion for leave to file an additional appearance (Document No. 28) appears

to be duplicative of Document No. 18 and is therefore **DENIED** as **MOOT**.

The Court further **GRANTS** the Plaintiffs' Motion for Leave to File Memorandum in Opposition to Motion to Dismiss Out of Time (Document No. 16) and Plaintiffs' Motion for Leave to File Additional Authority in Support of Their Responses to the Motions to Dismiss (Document No. 35).

As a final preliminary matter, the Court notes that the plaintiffs have voluntarily dismissed defendant Orchard Inn (*See* Document No. 26). Therefore, Orchard Inn's Motion to Dismiss (Document No. 25) is **DENIED** as **MOOT**.

I. BACKGROUND

The plaintiffs filed their original complaint on August 31, 1990. This complaint was stricken by the Court for violation of Local Rule 9(a) and the plaintiffs filed an amended complaint on September 24, 1990. The amended complaint alleges that on September 11, 1988, defendant Irby was arrested by defendants Gardner, Davidson and Bender for driving while intoxicated. Gardner is an Illinois state trooper, Davidson is the chief of the Martinsville Police Department, and Bender is a Clark County deputy sheriff.

The amended complaint states that after Irby's arrest, the officers left defendant Rice inside Irby's vehicle with the keys, thereby entrusting the vehicle to Rice when they knew or should have known that Rice was intoxicated. Approximately two hours later, Rice crossed the center line while driving Irby's car and hit the plaintiffs' vehicle head-on, causing the death of one passenger and her fetus and injuring five other passengers. The plaintiffs allege that just before the crash, defendant Ragsdale

chased Rice at speeds of more than 90 m.p.h., in an unmarked car, without sounding a siren or operating flasher lights.

The plaintiffs have alleged that the conduct of defendants Gardner, Davidson, Bender and Ragsdale caused or contributed to the crash. The plaintiffs seek damages from these defendants based upon (1) deprivation of the plaintiffs' life, liberty or property rights in violation of the Fourteenth Amendment rights; and (2) the defendants' willful and wanton conduct pursuant to **Ill. Rev. Stat.** ch. 85, ¶ 2-202.

II. ANALYSIS

For purposes of defendants' motions, all well-pleaded allegations of the complaint must be taken as true. *Wolfolk v. Rivera*, 729 F.2d 1114, 1116 (7th Cir. 1984). The test to be applied on a motion to dismiss is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985).[1]

[1] Defendants Bender and Ragsdale attack the plaintiffs' complaint on the grounds that it fails to sufficiently allege certain facts which constitute elements of the plaintiffs' causes of action. The defendants forget, however, that "fact pleading" is not required in federal court; rather the Federal Rules of Civil Procedure sanction "notice pleading." *Roberts v. Acres*, 495 F.2d 57, 58 (7th Cir. 1974). Defendants Bender and Ragsdale also argue that the complaint is defective because it commingles the claims of multiple plaintiffs in each of Counts 10 through 13, rather than separating each plaintiff's claim into a separate count. The Court, however, finds the complaint permissible under Federal Rule of Civil Procedure 10(b).

A. Jurisdiction

The defendants raise several arguments regarding the Court's jurisdiction over the plaintiffs' claims. First, defendant Bender points out that the amended complaint fails to invoke the jurisdiction of the court under 42 U.S.C. § 1983 or 28 U.S.C. § 1343(3). The plaintiffs acknowledge that they have not expressly invoked section 1343(3), but state that the proper course is to allow them to amend their complaint rather than to dismiss it. The Court agrees. Under 28 U.S.C. § 1653, "[d]efective allegations of jurisdiction may be amended . . . in the trial . . . court[ ]." Accordingly, the Court **GRANTS** the plaintiffs leave to amend their complaint to expressly invoke the Court's jurisdiction under 28 U.S.C. § 1343(3) and to identify their civil rights claims as being brought pursuant to 42 U.S.C. § 1983.

Defendant Clark County next argues that the Court lacks jurisdiction over the state law claims against the governmental agencies in Counts 11 and 13 of the amended complaint. As Bender points out, federal courts have jurisdiction to hear pendent claims but they do not have jurisdiction over pendent parties—i.e., parties not named in any claim that is independently cognizable by the federal court. *Finley v. United States*, 490 U.S. 545 (1989).[2] Thus, Counts 11 and 13 of the plaintiffs' amended com-

[2] The Court notes that Congress recently enacted a supplemental jurisdiction statute that would allow federal courts to exercise jurisdiction over "claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367 (1990). However, this statute applies only to civil actions commenced after the date of enactment, December 10, 1990. Thus, it is inapplicable to this suit, which was filed in August 1990.

plaint properly raise pendent claims against defendants Gardner, Davidson, Bender, and Ragsdale because they are already named as defendants in Counts 10 and 12, over which this Court has jurisdiction under 28 U.S.C. §§ 1331 & 1343(3). However, the governmental entities in Counts 11 and 13 have not been named in any claims to which federal jurisdiction applies. Similarly, all of the claims against defendants Rice and Irby are based solely upon state law.

The Court, therefore, concludes that it lacks subject matter jurisdiction over the claims against Rice, Irby, and the governmental entities. Accordingly, Counts 1 through 8 must be **DISMISSED**, along with the claims against the City of Martinsville, Clark County, and Jasper County in Counts 11 and 13. The Court notes that the plaintiffs previously dismissed their claims against the Illinois State Police (Document No. 12). Thus, the remaining arguments raised by that defendant are now **MOOT**.

B. Statute of Limitations

The defendants argue that Counts 10 through 13 of the plaintiffs' amended complaint are time-barred under the Illinois Tort Immunity Act's one-year statute of limitations for tort actions against governmental entities and employees. ILL. REV. STAT. ch. 85, ¶ 8-101 (1987). Because the plaintiffs' injuries occurred on Septemer 11, 1988, the defendants contend that the complaint should have been filed before September 11, 1989.

The Court initially notes that Counts 10 and 12 allege federal civil rights claims against defendants Gardner, Davidson, Bender, and Ragsdale. In suits brought pursuant to 42 U.S.C. § 1983, the federal courts will borrow

the state's general personal injury statute of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus, the applicable statute of limitations for section 1983 suits brought in Illinois is two years. *Kalimara v. Illinois Dep't of Corrections*, 879 F.2d 276 (7th Cir. 1989). The one-year limitations provision in the Illinois Tort Immunity Act, ILL. REV. STAT. ch. 85, ¶ 8-101, is not applicable to federal civil rights actions. *See Cain v. City of Chicago*, 619 F. Supp. 1228, 1233 (N.D. Ill. 1985) ("Tort Immunity Act was intended to apply to common law tort claims as opposed to quasi-tort actions of a constitutional nature."); *Luker v. Nelson*, 341 F. Supp. 111, 117-18 (N.D. Ill. 1972).

Defendant Ragsdale argues that the plaintiffs also have failed to meet the two-year limitations period because the amended complaint was not filed until September 24, 1990—more than two years after the plaintiffs' injuries occurred. The Court notes, however, that the plaintiffs first filed their complaint on August 31, 1990. The amended complaint was filed after the original complaint was stricken for violation of a local rule regarding incorporation by reference. Under Federal Rule of Civil Procedure 15(c), the amended complaint relates back to the date of the original pleading. Therefore, the Court finds that the plaintiffs' civil rights claims in Counts 10 and 12 are not time-barred.

With respect to the pendent state law claims in Counts 11 and 13, however, the Court concludes that the one-year limitations period in the Tort Immunity Act does apply. The plaintiffs argue that the wrongful death claims for the deaths of Pamela Jo Reed and Jason Wesley Reed are governed by the two-year statute of limitations in the state's wrongful death statute. ILL. REV. STAT. ch. 70, ¶ 2. The Court disagrees. The statute of limitations

provision in the Tort Immunity Act is a "special statute[ ] applicable to suits against public entities . . . which supersede[s] any pertinent general limitations statute thereto in effect . . . ." *Stanley v. Denning*, 130 Ill. App. 2d 628, 264 N.E.2d 521, 524 (2d Dist. 1970). By its terms, the Tort Immunity Act's one-year limitation period applies to civil actions for any injury, which is further defined in the act as "death, injury to a person, or damage to or loss of property." ILL. REV. STAT. ch. 85, ¶¶ 8-101, 1-204. The Tort Immunity Act, therefore, covers wrongful death actions as well as other types of tort actions filed against government entities.

The plaintiffs correctly argue, however, that the limitations period is tolled for the minors, Angela and Marilyn Reed. Statutes of limitation are generally tolled during a plaintiff's infancy. *Girman v. County of Cook*, 103 Ill. App. 3d 897, 431 N.E.2d 1291 (1st Dist. 1981); *Mendez v. Rutherford*, 655 F. Supp. 115 (N.D. Ill. 1986). Thus, Illinois courts have held that the Tort Immunity Act's notice requirement—which has since been repealed—is inapplicable to minors. *Girman*, 431 N.E.2d at 1293-94. In so holding, the courts have embraced a policy of protecting minors "from being deprived of an adjudication of their rights through no fault of their own." *Id.*

Based upon this reasoning, the Court finds that the minors' claims are not barred by the one-year statute of limitations in the Act. They may bring their claims against the governmental entities within one year from the date of injury or one year from the date of attaining majority. *Id.* at 1294. This ruling applies both to the minor's own injuries and to their claims as beneficiaries of the wrongful death claim of their mother. *Id.* at 1293-94. Thus, the Court holds that plaintiff Richard Reed, as administrator

of decedent Pamela Jo Reed's estate, may prosecute her wrongful death claims in Counts 11 and 13 on behalf of Angela and Marilyn Reed. As guardian of the two minors, he may also prosecute their claims for their own personal injuries.

The wrongful death claims for Jason Wesley Reed in Counts 11 and 13 present a more difficult case. However, the Court need not decide whether section 8-101 was tolled for these claims. Because the Court holds below that the amended complaint fails to state a section 1983 claim for Jason Wesley Reed, his state law claims must also be dismissed.

C. Federal Claims Against Gardner, Davidson, and Bender

Defendants Gardner, Davidson, and Bender argue that Count 10 of the plaintiffs' amended complaint fails to state a claim upon which relief can be granted. Count 10 alleges that these three defendants violated the plaintiffs' constitutional rights when they arrested Irby and left Rice in Irby's car with the car keys, thereby entrusting him with the car when they knew or should have known that he was intoxicated. The amended complaint alleges that as a result of these actions, the defendants caused or contributed to the crash between the plaintiffs' vehicle and the car Rice was driving.

The defendants argue that the plaintiffs fail to state a claim for deprivation of their constitutional rights because the defendants had no constitutional duty to protect the plaintiffs. In support of this argument, the defendants cite *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), in which the Supreme Court held that

"a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."

The Supreme Court was careful to point out, however, that while the state may have been aware of the dangers that the plaintiff in *DeShaney* faced,

> it played no part in their creation, nor did it do anything to render him any more vulnerable to them.
> . . .
> . . . The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.

Id. at 201. In the case at bar, the plaintiffs have alleged that the defendants affirmatively created the danger that caused their injuries. Thus, they argue that their case is distinguishable from *DeShaney*.

The plaintiffs contend that the defendants engaged in an affirmative act by "entrusting" Irby's vehicle to Rice. However, the only affirmative act alleged in the amended complaint is that the defendants arrested Irby. The remainder of the plaintiffs' allegations are directed at the defendants' *inaction*. The allegations are stated in positive terms—"They left defendant Larry Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice"—but the thrust of this allegation is that the defendants failed to prevent Rice from taking control over the vehicle.

This case is similar to *Gregory v. City of Rogers*, 921 F.2d 750 (8th Cir. 1990), but is distinguishable in one very significant respect. In *Gregory*, the two passengers in the vehicle were intoxicated, but the driver was sober. Thus, when the police officer arrested the driver on an outstand-

ing warrant, the officers deprived the passengers of their "designated driver." After the driver was arrested, one of the passengers took the wheel and ended up crashing the car, killing himself and seriously injuring the other passenger. Based upon those facts, the court held that the police officer had created the dangerous situation. "[B]y removing that driver, the state exposed the two passengers to grave danger . . . ." *Id.* at 754.

Gregory, therefore, is based upon the premise that "a constitutional deprivation can arise from private violence when the state affirmatively places a particular individual in a place of danger in which the individual would not otherwise have been." *Id.* at 755. The same theory applies to the other cases discussed in the *Gregory* decision. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (after a police officer arrested driver and impounded car, leaving passenger in a high-crime area, the passenger accepted a ride with an unknown motorist who took her to a secluded area and raped her), *cert. denied*, 111 S. Ct. 341 (1990); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police officers arrested a driver for drag-racing on a busy Chicago highway but left several children in the car on the side of the highway).

In the case at bar, the plaintiffs have not alleged that the police officers took a safe situation and turned it into a dangerous situation by arresting Irby. To the contrary, Irby herself presented a danger to other motorists. At best, the amended complaint alleges that the officers, after removing one intoxicated driver from the road, failed to take steps to prevent a second intoxicated person from taking the wheel.

The Court, therefore, concludes that the plaintiffs' amended complaint fails to state a claim against defen-

dants Gardner, Davidson, and Bender for deprivation of constitutional rights. Accordingly, Count 10 of the amended complaint must be **DISMISSED**. Based upon the earlier discussion regarding pendent party claims, the Court further holds that Count 11 must be **DISMISSED** as well.

D. Federal Claims Against Ragsdale

Count 12 of the amended complaint is similar to Count 10 in that it alleges that defendant Ragsdale deprived the plaintiffs of their constitutional rights. However, Count 12 presents a different case from that of the other police officers. The plaintiffs are not alleging that Ragsdale failed to protect them; rather, they allege that Ragsdale affirmatively placed them in a position of danger by chasing Rice at high speeds without sounding a siren or operating flasher lights. Thus, they have alleged that Rice *created* the dangerous situation that resulted in their injury.

Moreover, the plaintiffs allege that Ragsdale's actions were taken with deliberate indifference to the safety of others. Accordingly, the Court finds that the plaintiffs have sufficiently pleaded a claim for relief under 42 U.S.C. § 1983. *See Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (the court assumes that "the Supreme Court would hold that recklessly causing the death of another deprives that person of life without due process."), *cert. denied*, 489 U.S. 1069 (1989).

Defendant Ragsdale next argues that the amended complaint fails to show facts entitling relief for death of Jason Wesley Reed, who was an unborn infant at the time of the accident. In support of this argument, Ragsdale cites *Green v. Smith*, 71 Ill. 2d 501, 377 N.E.2d 37 (1978), in which the Illinois Supreme Court held that no cause of

action exists for the wrongful death of an unborn infant unless the fetus had attained viability at the time of the occurrence. *Green*, however, is inapposite because it dealt with a wrongful death claim under state law. The case at bar is brought pursuant to 42 U.S.C. § 1983. Thus, federal law governs whether the plaintiffs may recover for the death of a fetus.

One federal court has held that a viable fetus is a "person" capable of bringing a section 1983 suit. *Douglas v. Town of Hartford*, 542 F. Supp. 1267 (D. Conn. 1982). Others, however, have held to the contrary. *See, e.g., Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D. Puerto Rico 1988) (infant plaintiff did not become a citizen protected by the United States Constitution until birth); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981) (fetus has no fourteenth amendment rights while *in utero*). This Court is persuaded by the reasoning of *Ruiz Romero* and *Harman*. Therefore, the Court holds that because plaintiff Jason Wesley Reed was an unborn infant at the time of the accident, he cannot state a claim for relief under section 1983.

Accordingly, Jason Wesley Reed's claim in Count 12 of the amended complaint must be **DISMISSED**. In addition, based upon the earlier discussion regarding pendent party claims, the Court further holds that his claim in Count 13 must be **DISMISSED** as well.

E. State Claims Against Ragsdale

Defendant Ragsdale argues that the state law claims in Count 13 are barred by sections 2-202 and 3-102 of the Illinois Tort Immunity Act. As the plaintiffs point out, section 3-102 refers to a public entity's duty to exercise

ordinary care in the maintenance of its property. This section clearly has no applicability to the case at bar.[3]

Section 2-202 provides that "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." ILL. REV. STAT. ch. 85, ¶ 2-202 (1989). In the instant case, the plaintiffs have alleged that defendant Ragsdale's conduct was willful and wanton. Thus, their claims are not barred by section 2-202.

Finally, the Court addresses the issue of whether defendant Ragsdale is being sued in his individual or official capacity. The plaintiffs have stated in a memorandum that the claims against all of the officers are based upon their personal conduct and, thus, are brought against the officers in their individual capacities. The amended complaint, however, fails to reflect this intention.

The Seventh Circuit has held that section 1983 actions should be characterized as an "official capacity" suits where the complaints "fail to designate expressly the nature of the suit through utilization of the terms 'official capacity'

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[3] It is possible that the reference to section 3-102 resulted from a typographical error, and that the defendant intended to cite to section 4-102 of the Tort Immunity Act. Section 4-102 states that "[n]either a local public entity nor a public employee is liable for . . . failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals." Ill. Rev. Stat. ch. 85, ¶ 4-102 (1989). As the Court noted above, however, the claims against Ragsdale are not for failure to provide police protection. Rather, the plaintiffs allege that Ragsdale acted willfully and wantonly in chasing Rice without sounding a siren or operating flashing lights. Therefore, the plaintiffs' claims are not barred by section 4-102.

or 'individual capacity,' but which list in the case name of the complaint the official's job title . . . ." *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985). "If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities . . . he should expressly state so in the complaint." *Id.* at 568-69.

Based upon this standard, the Court finds that the plaintiffs' amended complaint improperly states a claim against Ragsdale in his official capacity. However, the Court **GRANTS** the plaintiffs' request for leave to amend the complaint to state claims against Ragsdale in his individual capacity.

III. SUMMARY

The Court **GRANTS** defendants Davidson and the City of Martinsville's motion for leave to file their appearance, jury demand and motion to dismiss (Document No. 15), their Motion to Correct Defendants' Motion to Dismiss (Document No. 30), and their motions for leave to file additional appearances (Document Nos. 18 and 36).

The Court further **GRANTS** the Plaintiffs' Motion for Leave to File Memorandum in Opposition to Motion to Dismiss Out of Time (Document No. 16) and Plaintiffs' Motion for Leave to File Additional Authority in Support of Their Responses to the Motions to Dismiss (Document No. 35).

The Court **DENIES** as **MOOT** defendants Davidson and City of Martinsville's third motion for leave to file an additional appearance (Document No. 28) and defendant Orchard Inn's Motion to Dismiss (Document No. 25).

The Court *sua sponte* **DISMISSES** Counts 1 through 8 of the amended complaint for lack of subject matter jurisdiction.

The Court **GRANTS** the motions to dismiss filed by defendants Gardner and the Illinois State Police (Document No. 11), Davidson and the City of Martinsville (*See* Document No. 15), and Bender and Clark County (Document No. 23).

The Court further **GRANTS** the motion to dismiss the claims against defendant Jasper County (Document No. 8) in Count 13. Defendant Ragsdale's motion to dismiss, contained in the same document, is **GRANTED** in part and **DENIED** in part. Jason Wesley Reed's claims are **DISMISSED** from Counts 12 and 13. However, the remaining claims against Ragsdale in Counts 12 and 13 are allowed to stand.

The Court finds there is no just reason for delay and directs the Clerk of the Court to enter judgment (1) dismissing Counts 1 through 7 against defendant Rice; (2) dismissing Count 8 against defendant Irby; (3) dismissing Counts 10 and 11 against defendants Gardner, Davidson, Bender, the City of Martinsville, and Clark County; (4) dismissing Jasper County from Count 13; and (5) dismissing the claims of Jason Wesley Reed from Counts 12 and 13.

Finally, the Court **GRANTS** the plaintiffs leave to amend their complaint to expressly invoke the Court's jurisdiction under 28 U.S.C. § 1343(3), to identify their civil rights claims as being brought pursuant to 42 U.S.C. § 1983, and to clarify that the civil rights claim is brought against defendant Ragsdale in his individual, rather than official, capacity.

IT IS SO ORDERED.

DATED: July 10, 1991

/s/ James L. Foreman
Chief Judge

[Filed September 24, 1990]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS

RICHARD REED, Individually and as administrator of the decedents' estates of PAMELA JO REED and JASON WESLEY REED, and as guardian of the estates of ANGELA REED and MARILYN REED, minors, and MARILYN KUYKENDALL and ROY KUYKENDALL,	)	
Plaintiffs,	)	
vs.	)	No. 90-4199-JLF
LARRY RICE, Serve: 1418 S. New Jersey Indianapolis, IN	)	PLAINTIFFS DEMAND TRIAL BY JURY
and	)	
CATHY IRBY, Serve: P.O. Box 264 Noble, Illinois	)	
and	)	
ORCHARD INN, INC., Serve: Jerry Jansen 800 N. 3rd Street Effingham, IL 62401	)	
and	)	

TROOPER THOMAS GARDNER,
Serve: c/o Illinois State
Police Department
District 12
Effingham, IL 62401

and

DEPARTMENT OF STATE POLICE,
Serve: Jeremy Margolis
Director of State
Police
State Armory, Rm. 103
Springfield, IL 62706

and

CHIEF HERMAN A. DAVIDSON,
Serve: c/o Martinsville
Police Department
19 West Cumberland
Martinsville, IL 62442

and

CITY OF MARTINSVILLE,
Serve: Mayor Truman Dean
P.O. Box 340
Martinsville, IL 62442

and

DEPUTY SHERIFF JAMES F. BENDER
Serve: c/o Clark County
Sheriff's Dept.
207 N. 5th Street
Marshall, IL 62441

and

CLARK COUNTY, ILLINOIS,
Serve: County Clerk
Lester E. Litteral
Clark County Courthouse
Marshall, IL 62441

and

DEPUTY SHERIFF JACK RAGSDALE,
Serve: c/o Jasper County
Sheriff's Department
106 E. Morgan
P.O. Box 112
Newton, IL 62448

and

JASPER COUNTY,
Serve: County Clerk
Ray Diel
Jasper County
Courthouse
100 W. Jourdan
Newton, IL 62448

Defendants.

FIRST AMENDED COMPLAINT AND JURY DEMAND

1. Jurisdiction is involved pursuant to 28 USC Section 1331 as to the Civil Rights claims, and the doctrine of pendant jurisdiction as to the state law claims.

2. Venue is invoked under 28 USC Section 1391(b), in that the claims asserted herein arose in Clark County and Jasper County, Illinois, both within the Southern District of Illinois.

COUNT 1

STATE LAW CLAIM OF RICHARD REED AS ADMINISTRATOR OF THE ESTATE OF PAMELA JO REED AGAINST DEFENDANT LARRY RICE.

1. Richard Reed is the administrator of the estate of Pamela Jo Reed, appointed by the Probate Court of Richland County, Illinois.

2. On 9/11/88, decedent Pamela Jo Reed, was riding in a Chevrolet Suburban being operated by her husband plaintiff Richard Reed. She was the front seat passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

3. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

4. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

5. As a result of the crash, Pamela Jo Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death.

6. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

WHEREFORE, plaintiff Richard Reed, as administrator of the estate of Pamela Jo Reed, prays for damages against defendant Larry Rice for the conscious pain and suffering and the medical expenses of Pamela Jo Reed under the Survival Act, Ill. Rev. Stat. Ch. 110-½, Para-

graph 27-6, for her funeral expenses under the Family Expenses Act, Ill. Rev. Stat. Ch. 40, Paragraph 1015, and for the pecuniary injuries to Richard Reed, Angela Reed, and Marilyn Reed resulting from Pamela Jo Reed's death, including the loss of her society and support, under the Wrongful Death Act, Ill. Rev. Stat. Ch. 70, Paragraph 1, all in the amount of THREE MILLION DOLLARS, and for costs expended herein.

COUNT 2

STATE LAW CLAIM OF RICHARD REED, AS ADMINISTRATOR OF THE ESTATE OF JASON WESLEY REED AGAINST DEFENDANT LARRY RICE.

1. Richard Reed is the administrator of the estate of Jason Wesley Reed, appointed by the Probate Court of Richland County, Illinois.

2. On 9/11/88, decedent Pamela Jo Reed, was riding in a Chevrolet Suburban being operated by her husband plaintiff Richard Reed. She was the front seat passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

3. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

4. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

5. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus.

6. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

WHEREFORE, Richard Reed, as administrator of the estate of Jason Wesley Reed, prays for damages against defendant Larry Rice for the conscious pain and suffering of Jason Wesley Reed under the Survival Act, Ill. Rev. Stat. Chapter 110-½, Paragraph 27-6, for his funeral expenses under the Family Expenses Act, Ill. Rev. Stat. Ch. 40, Paragraph 1015, and for the pecuniary injuries to Richard Reed, Angela Reed and Marilyn Reed, resulting from Jason Wesley Reed's death, including the loss of his society and support, under the Wrongful Death Act, Ill. Rev. Stat. Ch. 70, Paragraph 1, all in the amount of ONE MILLION DOLLARS ($1,000,000.00), and for costs expended herein.

COUNT 3

STATE LAW CLAIM OF RICHARD REED, AS ADMINISTRATOR OF THE MINOR'S ESTATE OF ANGELA REED, AGAINST DEFENDANT LARRY RICE.

1. Richard Reed is administrator of the estate of Angela Reed, a minor, appointed by the Probate Court of Richland County, Illinois.

2. On 9/11/88, plaintiff Angela Reed, age 7, was riding in a Chevrolet Suburban being operated by her father plaintiff Richard Reed. She was the rear passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

3. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

4. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

5. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

WHEREFORE, Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendant Larry Rice for the personal injuries to Angela Reed in the amount of TWO HUNDRED THOUSAND DOLLARS, ($200,000.00), and for costs expended herein.

COUNT 4

STATE LAW CLAIM OF RICHARD REED, AS ADMINISTRATOR OF THE MINOR'S ESTATE OF MARILYN REED AGAINST DEFENDANT LARRY RICE.

1. Richard Reed is the administrator of the estate of Marilyn Reed, a minor, appointed by the Probate Court of Richland County, Illinois.

2. On 9/11/88, plaintiff Marilyn Reed, age 17 months, was riding in a Chevrolet Suburban being operated by her father plaintiff Richard Reed. She was the rear passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

3. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

4. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

5. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendant Larry Rice for the personal injuries to Marilyn Reed, in the amount of THREE MILLION DOLLARS, ($3,000,000.00), and for costs expended herein.

COUNT 5

STATE LAW CLAIM OF RICHARD REED INDIVIDUALLY, AGAINST DEFENDANT LARRY RICE.

1. On 9/11/88, plaintiff Richard Reed, was driving his Chevrolet Suburban north on Illinois Route 130 in Jasper County, Illinois, accompanied by his family.

2. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

3. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

4. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

WHEREFORE, plaintiff Richard Reed, individually, prays for damages against defendant Larry Rice for his own personal injuries and for his and Marilyn Reed's medical expenses, in the amount of FIVE HUNDRED THOUSAND DOLLARS, ($500,000.00), and for costs expended herein.

COUNT 6

STATE LAW CLAIM OF MARILYN KUYKENDALL AGAINST DEFENDANT LARRY RICE.

1. On 9/11/88, plaintiff Marilyn Kuykendall, was riding in a Chevrolet Suburban being operated by her son-in-law plaintiff Richard Reed. She was the rear passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

2. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

3. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

4. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

WHEREFORE, plaintiff Marilyn Kuykendall prays for damages against defendant Larry Rice in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS, ($1,500,000.00), and for costs expended herein.

COUNT 7

STATE LAW CLAIM OF ROY KUYKENDALL AGAINST DEFENDANT LARRY RICE.

1. On 9/11/88, plaintiff Roy Kuykendall, was riding in a Chevrolet Suburban being operated by plaintiff Richard Reed. He was the rear passenger. They were travelling north on Illinois Route 130 in Jasper County, Illinois.

2. At about 2:40 p.m., the Reeds were struck head-on by a car being driven by defendant Larry Rice.

3. The negligence of defendant Rice caused or contributed to cause the crash in that defendant Rice, who was proceeding south on Route 130, crossed the center line and operated his car in an intoxicated condition.

4. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Roy Kuykendall prays for damages against defendant Larry Rice in the amount of FIVE HUNDRED THOUSAND DOLLARS, ($500,000.00), plus costs expended herein.

COUNT 8

STATE LAW CLAIMS OF ALL PLAINTIFFS AGAINST DEFENDANT CATHY IRBY.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. The car which defendant Larry Rice was driving at the time of the crash was owned by defendant Cathy Irby.

3. Approximately two hours before the crash, defendant Cathy Irby, along with defendants Gardner, Davidson and Bender, as alleged in Counts X and XI, negligently entrusted her car to defendant Larry Rice when she knew or should have known that Rice was intoxicated, that he would drive the car, and that when he drove the car, injury was likely to result.

4. Defendant Irby's negligence caused or contributed to cause the crash.

5. As a result of the crash, Pamela Jo Reed, age 30, sustained lacerations of the major blood vessels, frac-

tured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

6. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

7. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

8. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

9. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

10. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

11. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the Estate of Pamela Jo Reed, prays for damages against defendant Cathy Irby in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the estate of Jason Wesley Reed, prays for damages against defendant Cathy Irby in the amount of $1,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendant Cathy Irby in the amount of $200,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendant Cathy Irby in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, individually, prays for damages against defendant Cathy Irby in the amount of $500,000.00, and for costs; plaintiff Marilyn Kuykendall prays for damages against defendant Cathy Irby in the amount of $1,500,000.00, and for costs, and plaintiff Roy Kuykendall prays for damages against defendant Cathy Irby in the amount of $500,000.00, and for costs.

COUNT 9

STATE LAW CLAIMS OF ALL PLAINTIFFS AGAINST THE ORCHARD INN, INC.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. On the morning of the crash, defendant Orchard Inn, Inc., sold liquor which was consumed by Rice, and which caused his intoxication.

3. Rice's intoxication caused or contributed to cause the crash.

4. As a result of the crash, Pamela Jo Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

5. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

6. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

7. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

8. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

9. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

10. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

11. In addition, the crash caused the loss of the means of support from Pamela Reed, Richard Reed, Roy Kuykendall and Marilyn Kuykendall.

WHEREFORE, pursuant to Ill. Rev. Stat. Ch. 43, Paragraph 135, plaintiff Richard Reed, as administrator of the estates of Pamela Joe Reed, Jason Wesley Reed, Angela Reed, Marilyn Reed, and individually, prays for damages against defendant The Orchard Inn, Inc., in the amount of $320,000.00, and for costs; and plaintiffs Roy Kuykendall and Marilyn Kuykendall pray for damages against defendant The Orchard Inn, Inc., in the total amount of $200,000.00, and for costs.

COUNT 10

CIVIL RIGHTS CLAIMS OF ALL PLAINTIFFS AGAINST DEFENDANT GARDNER, DAVIDSON AND BENDER.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. The car which defendant Larry Rice was driving at the time of the crash was owned by defendant Cathy Irby.

3. Approximately two hours before the crash, defendants Gardner, Davidson and Bender arrested defendant Cathy Irby in Clark County, Illinois. They left defendant Larry Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice, when they knew or should have known that Rice was intoxicated, that Rice would drive the car, and that when Rice drove the car, injury was likely to result. Defendants Gardner, Davidson and Bender, were thus deliberately indifferent to the safety of others including plaintiffs. Defendants thereby acting as state, county and municipal police officers, deprived plaintiffs of their life, liberty and property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

4. The conduct of defendants Gardner, Davidson and Bender caused or contributed to cause the crash.

5. As a result of the crash, Pamela Joe Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

6. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

7. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency

room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

8. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

9. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

10. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

11. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the Estate of Pamela Jo Reed, prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the estate of Jason Wesley Reed, prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $1,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendants Gardner, Davidson and Bender, jointly and sever-

ally in the amount of $200,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, individually, prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $500,000.00, and for costs; plaintiff Marilyn Kuykendall prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $1,500,000.00, and for costs, and plaintiff Roy Kuykendall prays for damages against defendants Gardner, Davidson and Bender, jointly and severally in the amount of $500,000.00, and for costs.

COUNT 11

STATE LAW CLAIMS OF ALL PLAINTIFFS FOR WILLFUL AND WANTON CONDUCT AGAINST DEFENDANTS GARDNER, DAVIDSON, BENDER, DEPARTMENT OF STATE POLICE, CITY OF MARTINSVILLE AND CLARK COUNTY.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. The car which defendant Larry Rice was driving at the time of the crash was owned by defendant Cathy Irby.

3. Approximately two hours before the crash, defendants Gardner, Davidson and Bender arrested defendant Cathy Irby in Clark County, Illinois. They left defendant Larry Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice, when they knew or should have known that Rice was intoxicated, that Rice would

drive the car, and that when Rice drove the car, injury was likely to result. Defendants Gardner, Davidson and Bender, were thus deliberately indifferent to the safety of others including plaintiffs. Defendants thereby acting as state, county and municipal police officers, deprived plaintiffs of their life, liberty and property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

4. The conduct of defendants Gardner, Davidson and Bender caused or contributed to cause the crash.

5. The conduct of defendants Gardner, Davidson and Bender was willful and wanton within the meaning of Ill. Rev. Stat. Ch. 85, Paragraph 2-202.

6. At all times mentioned, defendant Gardner was acting within the course and scope of his employment with defendant Department of State Police; defendant Davidson was acting within the course and scope of his employment with defendant City of Martinsville; and defendant Bender was acting within the course and scope of his employment with defendant Clark County.

7. As a result of the crash, Pamela Joe Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

8. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard

Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

9. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

10. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

11. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

12. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

13. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the Estate of Pamela Jo Reed, prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the estate of Jason Wesley Reed, prays

for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $1,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $200,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, individually, prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $500,000.00, and for costs; plaintiff Marilyn Kuykendall prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $1,500,000.00, and for costs, and plaintiff Roy Kuykendall prays for damages against defendants Gardner, Davidson and Bender, Department of State Police, City of Martinsville, and Clark County, jointly and severally in the amount of $500,000.00, and for costs.

COUNT 12

CIVIL RIGHTS CLAIMS OF ALL PLAINTIFFS AGAINST DEFENDANT RAGSDALE.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. Beginning a few minutes before the crash, Deputy Jack Ragsdale of the Jasper County Sheriff's Department chased the car being driven by defendant Rice. Defendant Ragsdale drove at speeds of over 90 mph, in an unmarked car, without sounding a siren or operating adequate flasher lights, or otherwise giving an adequate warning to oncoming traffic, when he knew or should have known that Rice was drunk, would not pull over, and that injury was likely to result. Defendant Ragsdale's conduct in chasing Rice caused or contributed to cause the crash.

3. Defendant Ragsdale was thus deliberately indifferent to the safety of others, including plaintiffs, and thereby, acting as a county deputy sheriff, deprived plaintiffs of life, liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

4. As a result of the crash, Pamela Joe Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

5. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

6. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

7. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

8. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

9. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

10. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the Estate of Pamela Jo Reed, prays for damages against defendant Ragsdale in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the estate of Jason Wesley Reed, prays for damages against defendant Ragsdale in the amount of $1,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendant Ragsdale in the amount

of $200,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendant Ragsdale in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, individually, prays for damages against defendant Ragsdale in the amount of $500,000.00, and for costs; plaintiff Marilyn Kuykendall prays for damages against defendant Ragsdale in the amount of $1,500,000.00, and for costs, and plaintiff Roy Kuykendall prays for damages against defendant Ragsdale in the amount of $500,000.00, and for costs.

COUNT 13

STATE LAW CLAIMS OF ALL PLAINTIFFS FOR RECKLESS, WILLFUL AND WANTON CONDUCT AGAINST DEFENDANTS RAGSDALE AND JASPER COUNTY.

1. On 9/11/88, plaintiffs were the occupants of a Chevrolet Suburban which was hit head on by a car operated by defendant Larry Rice, who was intoxicated and who crossed the center line.

2. Beginning a few minutes before the crash, Deputy Jack Ragsdale of the Jasper County Sheriff's Department chased the car being driven by defendant Rice. Defendant Ragsdale drove at speeds of over 90 mph, in an unmarked car, without sounding a siren or operating adequate flasher lights, or otherwise giving an adequate warning to oncoming traffic, when he knew or should have known that Rice was drunk, would not pull over, and that injury was likely to result. Defendant Ragsdale's conduct in chasing Rice caused or contributed to cause the crash.

3. Defendant Ragsdale's conduct was in reckless disregard for the safety of others within the meaning of

Ill. Rev. Stat. Ch. 95-½, Paragraph 11-205(e), and was willful and wanton within the meaning of Ill. Rev. Stat. Ch. 85, Paragraph 2-202, and violated Ill. Rev. Stat. Ch. 95-½, Paragraph 12-601(b).

4. At all times mentioned, defendant Ragsdale was acting within the course and scope of his employment as a deputy sheriff with defendant Jasper County.

5. As a result of the crash, Pamela Joe Reed, age 30, sustained lacerations of the major blood vessels, fractured ribs, multiple fractures of her right arm, right leg and pelvis, and a severe avulsion fracture of the scalp. She died of these injuries within hours of the crash despite medical treatment of a cost of approximately $7,000.00. She was eight months pregnant at the time of her death. Pamela Jo Reed was married to plaintiff Richard Reed at the time of her death, and was the mother of the minors Angela Reed and Marilyn Reed.

6. The baby with whom Pamela Jo Reed was pregnant, Jason Wesley Reed, also died as a result of the crash. His gestational age was 32 weeks. The crash caused the placenta to separate from the uterus. Richard Reed was the father of Jason Wesley Reed and Angela and Marilyn Reed were his only siblings.

7. Angela Reed sustained bruises and scratches in the crash and was treated and released at an emergency room at a cost of less than $1,000.00. Also as a result of the crash, she suffered and continues to suffer severe emotional trauma.

8. As a result of the crash, Marilyn Reed suffered brain damage with post-traumatic encephalopathy and seizures, and fractures of both femurs and a fractured mandible. Her medical expenses to date are over $100,000.00.

9. Plaintiff Richard Reed sustained a fractured wrist as a result of the crash, and has become obligated for medical expenses for treatment to himself and to his daughter Marilyn in excess of $100,000.00, which expenses for Marilyn are continuing. He further suffers severe emotional trauma from the experience.

10. As a result of the crash, plaintiff Marilyn Kuykendall suffered fractures of her right arm, left ankle, pelvis, left leg, and internal injuries including injuries to her bladder and bowel. She has become obligated for medical expenses in excess of $200,000.00.

11. As a result of the crash, plaintiff Roy Kuykendall suffered and continues to suffer fractured ribs, back pain and severe emotional trauma, and has incurred medical expenses in excess of $50,000.00.

WHEREFORE, plaintiff Richard Reed, as administrator of the Estate of Pamela Jo Reed, prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the estate of Jason Wesley Reed, prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $1,000,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Angela Reed, prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $200,000.00, and for costs; plaintiff Richard Reed, as administrator of the minor's estate of Marilyn Reed, prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $3,000,000.00, and for costs; plaintiff Richard Reed, individually, prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $500,000.00, and for costs; plaintiff Marilyn

Kuykendall prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $1,500,000.00, and for costs; and plaintiff Roy Kuykendall prays for damages against defendants Ragsdale and Jasper County, jointly and severally in the amount of $500,000.00, and for costs.

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No. 93-392

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TROOPER THOMAS GARDNER,

Petitioner,

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARIZONA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MAINE, MINNESOTA, MONTANA, NEVADA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WISCONSIN, THE TERRITORY OF AMERICAN SAMOA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a police officer violates the substantive due process rights of victims of private car accidents if he arrests an allegedly sober driver and abandons the car to a drunk passenger who then drives the car and eventually causes injury?

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No. 93-392

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INTEREST OF THE AMICI CURIAE

The amici States, Territory, and Commonwealth have an abiding interest in this case, in which the Seventh Circuit employed a notion of "substantive due process" assertedly left intact and sanctioned by the ruling in

DeShaney v. Winnebago County Social Services Department, 489 U.S. 189 (1989), to hold that auto accident victims may prove a claim under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, by reaching back into the chain of causation to a police officer whom the victims never met, who never had any intent to harm the victims, and whose only allegedly unconstitutional actions consisted of failing to prevent a drunk passenger (Larry Rice) in a stopped car from assuming the wheel after the driver of the car Rice was in, Cathy Irby, was herself arrested.

As the Petitioner amply demonstrates, the Seventh Circuit has fundamentally distorted the holding and principle of this Court's decision in *DeShaney*. The court of appeals, moreover, has done so in a way that conflicts with decisions of other circuits, and which demonstrates the great confusion in the lower federal courts, and in the highest state courts, over the scope of the Fourteenth Amendment and the doctrine of "substantive due process" in particular. The result in the Seventh Circuit is not isolated, and, indeed, the issue presented here is a frequently recurring one, affecting hundreds of thousands if not millions of public officials and employees in the Nation who are possibly subject to the reach of 42 U.S.C. § 1983.

The legal theory underlying the decision of the Seventh Circuit in this case has very disturbing implications for the States and Territories, above and beyond its general errors in expanding the notion of "substantive due process" beyond the limits set by this Court in *DeShaney* and other cases. Many of the amici jurisdictions would undoubtedly reject common law or statutory liability against Trooper Gardner. All of the amici here believe

that the States and Territories should have the option of determining on their own whether to do so. Trooper Gardner, after all, never specifically intended to harm the accident victims in this case. Indeed, he never even met them. There is no allegation that Trooper Gardner told Rice to get behind the wheel, to start the car, and to drive it down Route 130 in Jasper County, Illinois, at a speed in excess of ninety miles an hour. Nor did Trooper Gardner have anything to do with the actions of Jasper County Deputy Sheriff Jack Ragsdale, who allegedly was chasing Rice at that speed in an unmarked police car without sounding a siren, operating adequate flasher lights, or otherwise giving warning to oncoming traffic. It is not alleged that Gardner had ever even met or spoken with Ragsdale, that night, or ever before.

Although the Seventh Circuit wrote that the Reeds "face an insurmountable hurdle on summary judgment," the amici States cannot so easily dismiss either the decision or the result in this case. Permitted to stand, the Seventh Circuit's decision in the case below at best constitutionalizes simple negligence and at worst creates a bizarre form of liability that subsidizes the outrageous conduct of tortfeasors like Larry Rice by allowing victims to sue any government official who had anything to do with an accident in a "but for causation" sense.

Because the decision of the Seventh Circuit in this case sharply departs from this Court's repeated admonition that the Due Process Clause is not a "font of tort law," *see Paul v. Davis*, 424 U.S. 693 (1976), and, what is more, radically displaces the common law of torts that exists in many of the States, making public officials (even holding aside the prospect of awards against them under

the Civil Rights Attorneys Fees Act of 1976 (42 U.S.C. § 1988)) even worse off than they would be under state law, the amici States, Territory, and Commonwealth submit this brief in support of Petitioner, and urge the Court to grant review in this case.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Decision of the Seventh Circuit in this Case Directly Conflicts With this Court's Logic and Reasoning in *DeShaney v. Winnebago County Department of Social Services*, and Constitutes an Unwarranted Expansion of the Doctrine of Substantive Due Process.

1. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S 189 (1989), this Court confronted the issue of "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights." *Id.* at 194. The facts in *DeShaney* were "undeniably tragic," *id.* at 191, and consisted of accusations by Joshua DeShaney's mother, made known to the Winnebago County Department of Social Services, that Joshua's father had " 'hit the boy' " and that Joshua was a " 'prime candidate for child abuse.' " *Id.* at 192. After once dismissing the allegations after interviewing Joshua's father, the County was notified by an emergency room physician that Joshua's father was suspected of child abuse after Joshua was brought to a local hospital with multiple bruises and abrasions. *Id.* Despite this proof, Joshua was released to his father's custody after a three-day stay in the hospital. *Id.* Joshua

was brought into the hospital again; the County was notified again; the County again saw no basis to remove Joshua from his father's custody. *Id.* A caseworker noted continued violations of the conditions on which Joshua's father was allowed continued custody, but took no action to remove Joshua from the home. *Id.* at 193. The County was even notified by emergency room personnel a third time that Joshua apparently had been the victim of child abuse. *Id.* Despite all of this notice, the County did nothing to take Joshua from his father, who ultimately beat Joshua into a life-threatening coma, leaving Joshua permanently brain damaged and "expected to spend the rest of his life confined to an institution for the profoundly retarded." *Id.* Despite these tragic facts, the Court found that there could be no federal liability against the County under the Constitution and 42 U.S.C. § 1983, mainly because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. "Nor," the Court held, "does history support such an expansive reading of the constitutional text"; the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 195-96. "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. Thus, "the State had no constitutional duty to protect Joshua against his father's violence" and "its failure to do so – though calamitous in hindsight – simply does not constitute a violation of the Due Process Clause." *Id.* at 202. Joshua's right to recover

against Winnebago County thus depended on local law. *Id.* at 203.

2. In this case, the Seventh Circuit perceived a critical distinction between the facts here and those in *DeShaney*, in that the complaint in this case could possibly be read to suggest that, in arresting Cathy Irby, who may have been sober, and not disabling Larry Rice, who, it is alleged, was drunk, Trooper Thomas Gardner made the accident victims in this case "more vulnerable" to the risk that Rice would find the keys to the car, drive drunk, speed recklessly, refuse to stop in response to Jasper County Deputy Sheriff Ragsdale's high-speed pursuit, and then, one must assume unintentionally, crash into the car in which Richard Reed and his family were driving. Like other cases in which the courts of appeals have evaded the reasoning of this Court's precedents on the basis of the truism that all cases are distinguishable unless they are factually identical, the judgment in this case should be swiftly reversed. *See United States v. Stanley*, 483 U.S. 669, 680 (1987).

3. At the outset, there are several critical aspects to the facts in this case that make the recognition of a substantive due process claim significantly more offensive to the precepts of *DeShaney* than the facts in *DeShaney* itself. Unlike the case in *DeShaney*, where the defendant had been repeatedly and unquestionably placed on notice that a specific victim – a totally defenseless child – was in the gravest danger from a very specific individual, here, even viewed through the prism of a Rule 12 motion, Trooper Gardner would have to be charged, as a federal matter, with an enormously higher duty than was sought to be imposed in *DeShaney*. Not only would Trooper Gardner have to be expert in the

general physiological effect of alcohol on Larry Rice, he would have to know Rice's probable response to (1) being left in the car with the keys (located someplace in the car); (2) the effects of two hours of driving (with arguable intervening drinking in between) on Rice's ability to control the car; (3) the intervening presence of Deputy Sheriff Ragsdale's high speed chase; and (4) the likelihood that all of the foregoing risks would coalesce and cause the accident here. In contrast to the foregoing, there is nothing to suggest that Rice himself could have been arrested merely for being drunk in the car driven by Irby, or how long he would have been held by the police even if he could have been arrested. *Compare County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991) (noting, even within first 48 hours, booking must be prompt and delays may be tolerated only for valid administrative reasons). Had Gardner called a cab for Rice, but the cab driver turned out to be drunk and killed Rice, no doubt Trooper Gardner could be sued under the identical theory accepted by the Court below. This is plainly not the law. *See Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *Martinez v. California*, 444 U.S. 377 (1980). If the knowing-if-not-reckless conduct at issue in *DeShaney* could not be the basis for a substantive due process claim, then surely the arguably negligent conduct asserted to have been alleged here must require dismissal of Respondents' claims. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (Rule 12 motion must be granted even if complaint raises a claim that is "close but unavailing").

4. Even if, however, the conduct at issue here could be characterized as the same sort of recklessness at issue

in the *DeShaney* case, this case, at a minimum, is controlled by the Court's reasoning in *DeShaney*, and is not even arguably distinguishable from *DeShaney*. In this regard, the Seventh Circuit has simply evaded this Court's reasoning. In particular, the court of appeals in this case has read out of context this Court's statement that a due process claim could not lie in *DeShaney* because there the State "played no part" in the "creation" of the "dangers that Joshua faced." As in *DeShaney* itself, Trooper Gardner did not take Larry Rice out and get him drunk; he did not tell Rice that it was all right to drive; he certainly did not tell Rice to drive ninety miles an hour on a two-lane, undivided highway. And if Trooper Gardner did in some sense "tell" Rice to do what he did that caused the tragic accident in this case, Trooper Gardner's message was plainly no worse than the implied message given to Randy DeShaney by the Winnebago County Department of Social Services, *i.e.*, "do what you want."

5. As this Court reiterated in *DeShaney*, "we have said many times" that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." 489 U.S. at 202. The decision of the Seventh Circuit, in addition to being in conflict with decisions of other federal circuits, *e.g.*, *Nobles v. Brown*, 985 F.2d 235 (6th Cir. 1992), and the decisions of the highest courts of several States, *e.g.*, *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447 (Mass. 1993), is completely at odds with this admonition, both generally, and in its particulars as explained in *DeShaney*. While "[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way" for the respondents to recover, *cf.*, 489

U.S. at 202, a decision of this Court "must be followed by the lower courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Because the court below, and, indeed, some other courts in similar circumstances, *e.g.*, *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993), have failed to heed this precept, or have been confused by *DeShaney*, this Court should grant the writ and promptly reverse the Seventh Circuit's mandate with instructions to reinstate the Rule 12 judgment for Petitioner.

B. The Seventh Circuit's Displacement of Local Tort Law with the Doctrine of Substantive Due Process Raises an Issue of Nationwide Importance that Should Be Reviewed by this Court, Lest the States' Refusal to Subsidize the Recklessly Tortious Acts of Drunk Drivers and Other Private Actors Be Undermined in the Guise of § 1983 "Failure to Act" Due Process Claims.

1. In addition to breaching the Court's repeated disclaimers that the Due Process Clause is not a "font of tort law," the decision below fashions a federal remedy that, for many States, goes *beyond* what local law would provide; and, because the accident victims in this case, under both state tort and § 1983 precepts, can recover only once, the Seventh Circuit's decision, if permitted to stand, will result in displacement of state tort law in a way that *subsidizes* the sort of reckless behavior in which Larry Rice – if the complaint is correct – engaged during the early hours of September 11, 1988. As such, the decision below constitutes not only a federalization of liability that

might otherwise be imposed on Trooper Gardner as a matter of state law, it constitutes a federal *subsidy* to tortfeasors like Larry Rice who otherwise would be required under the tort law of their State to pay the full price of their actions.

2. As noted by Petitioner, the clear majority of States do not, as a matter of local law, impose a duty on their local police to restrain drunk drivers, because the duty to do so is one that is owed to "the public" generally and not to any individual. *See* J.L. Isham, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 § 2[a], at 325 (1986). Like the limitations built into the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), these court decisions recognize that to hold otherwise operates to require taxpayers to subsidize the private torts of those who directly cause tortious injury, in this case by driving recklessly, dangerously, and, allegedly, stone drunk. Here, of course, Trooper Gardner is sued in his individual capacity, and the Eleventh Amendment is not a bar. *Papasan v. Allain*, 478 U.S. 265, 278 n.11 (1986). But, if liability is foisted upon him, the public ultimately will pay in the form of higher taxes necessary to induce those subject to liability to work for state and local government. And, as the ruling below is a constitutional one, the decision below threatens the federal fisc in the same way.

3. Although the immunity conferred by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), would, we are confident, eliminate any threat of liability in this case, this Court should not permit the Seventh Circuit and the other courts that may choose to follow it to go down this

federal road in the first instance. Government officials should not be permitted to be sued for any remote role they may have had in "creating" a "danger" that leads to a private loss. Doing so ultimately will destroy the values of individual responsibility and the role of private insurance that properly allocate risk in state tort systems.

4. The amici States submit that, whatever may be the cure for tortious conduct as occurred in this case, it is not the result offered by the Seventh Circuit. Because the decision in this case will, if allowed to stand, have wide-ranging repercussions in supplanting the tort laws of the several States, and creating anomalous subsidies for private tortious conduct, this Court should grant the writ of certiorari, and reverse the judgment of the Seventh Circuit with instructions to restore the Rule 12 judgment that was entered for Petitioner in the District Court.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Court should grant the writ of certiorari and reverse the judgment of the Seventh Circuit, with instructions to affirm the judgment of the District Court in favor of Trooper Gardner.

Dated: Honolulu, Hawaii, October 7, 1993.

Respectfully submitted,

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